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A

# HANDBOOK

OF

# BANKERS' LAW.

BY THE LATE

HENRY ROBERTSON, N.P.

Fifth Edition,

REVISED BY

BREMNER PATRICK LEE, M.A.,

ADVOCATE.

EDINBURGH:

BELL & BRADFUTE, 12 BANK STREET.

LONDON: SWEET & MAXWELL, LIMITED.

MDCCCXCI.

EDINBURGH:

PRINTED BY LORIMER AND GILLIES,

31 ST. ANDREW SQUARE.

# PREFACE TO THE FIFTH EDITION.

Since the last edition of this work was published in 1881, several important Statutes have considerably altered the Law affecting Bankers in Scotland.

The Editor, while incorporating these, and referring to the cases recently decided in the Courts, has, as far as possible, preserved the original form of the work.

The Bills of Exchange Act of 1882 so thoroughly codified the Law on that subject, that the most convenient course seemed to be to re-write the Chapter on Bills altogether; the Editor has to acknowledge his great indebtedness to Mr. J. D. Sym, Advocate, who wrote most, and revised the whole, of that part of the work.

Mr. J. S. Fleming, the Cashier and General Manager of the Royal Bank of Scotland, has very kindly revised his Memorandum as to Banking in Scotland, which formed so valuable a supplement to the last two editions.

B. P. L.

*July*, 1891.

# PREFACE TO THE FIRST EDITION.

This Handbook has been written for the more immediate use of those engaged in the business of Banking, and the object which the Writer has had in view has been to give, in language freed as far as possible from technicalities, a concise and distinct statement of the Law so far as it bears on that branch of business. To enable the Banker to carry through his more important transactions with entire confidence and security, it is essential that he should possess accurate knowledge of the law which regulates them, as, from the despatch with which business is now-a-days transacted, it is impossible for him on every occasion to find time to consult his lawyer. He should, therefore, not only be able at once to judge of the validity of the obligations and grounds of debt on which advances are to be made, but ought also to be aware of the legal principles by which they are regulated, so as to enable him to place his transactions on the best and safest footing. Without such knowledge the Banker runs a constant risk of being involved in lawsuits, and of suffering pecuniary loss in the event of any emergency—such, for example, as the bankruptcy of his customer.

There are many difficulties in the way of a Banker, who has not had a legal education, acquiring a knowledge of Mercantile Law. It is no easy matter, indeed, to know where to look for the necessary information. The progress of Law Reform has of late years been so rapid, that the existing Commentaries on the Law of Scotland are quite behind the time. More especially is this the case with the "Law Merchant," which, to a great extent, lies imbedded in Acts of Parliament and Decisions of the Court. Since the publication of Mr. Bell's great work, the passing of the Mercantile Amendment and other Acts, and the introduction of English Law into that of Scotland, have effected almost an entire revolution in the Mercantile Law of this country. In such circumstances, it is a hopeless task for any non-professional person to acquire accurate information from the text-books; and in the hope that it may be useful to those engaged in Banking, the Writer has attempted in this Handbook to bring together the leading principles of law bearing on Banking transactions. Some of the subjects comprehended in it—such as Bills and Bankruptcy—form the text of separate works; and it is almost unnecessary to state that the observations upon these and other matters have in this manual been limited to the points and principles which have a direct and practical bearing on the subject of the book. All irrelevant matter, and details with which it is not necessary the Banker should trouble himself, have been omitted, in order that the class of persons for whose use the work is intended may the more readily acquire the legal knowledge which has special reference to their profession.

The Writer has refrained from all speculative statements of law, and has strictly confined himself to what has been authoritatively ascertained. From the number of subjects embraced in the book, the illustrations are necessarily limited, but references to the authorities have been added in case any one may wish to pursue his inquiries further.

The Appendix, containing Forms of documents in daily use among Bankers, will, it is thought, prove an acceptable addition to the work.

*October*, 1862.

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# A HANDBOOK

OF

# BANKERS' LAW.

## CHAPTER I.

### OF MERCANTILE WRITS, AND THE EXECUTION OF DEEDS, AND PARTIES WHO MAY GRANT THEM.

The legal writings which have a direct bearing on the transactions of a banker are divisible into two great classes, namely, first, Documents which regulate mercantile transactions, termed, in legal phraseology, writings *in re mercatoria;* and second, Writings or deeds in the preparation of which certain formalities and solemnities are required by law. These deeds may be stated generally as comprehending all conveyances of heritages and moveables, bonds for borrowed money, agreements, and all contracts of whatever nature.

**Writings in re Mercatoria.**—All documents necessary for carrying through commercial transactions are privileged by law in respect that they are effectual though not executed with legal formalities; that is to say, they do not require to be signed before witnesses, and, of course, have no testing clause. The ground on which this privilege rests is simply that the operations of commerce may not be impeded by requiring formal documents in transactions which are of hourly occurrence in all parts of the kingdom. Wherever these documents, therefore, are intelligibly expressed, they will be binding on the granter, unless the authenticity of the signature is successfully impugned. Among these writings are comprehended bills, promissory-notes,

drafts, cheques, mandates, receipts, and all documents connected with the sale of goods, or to which the exigencies of trade give rise. Procurations occasionally fall under the class of privileged documents. Of most of these documents we shall have occasion to treat afterwards.

**Execution of Deeds.**—The Conveyancing (Scotland) Act, 1874, having introduced important alterations on this subject, it will be proper to describe the practice prior to 1st October, 1874, when the Act came into operation, and the changes which that Act introduced.

**Practice prior to 1st October, 1874 (and which may still be followed).**—The solemnities attending the execution of a deed required to be accurately stated in the testing-clause of the document, and the omission of any of them was in effect a vitiation of the deed. Following the order of the testing-clause, the first essential point was the *full name and designation of the writer of the deed.* Although the writer's name and designation are generally set forth in the testing-clause, it was not indispensable that this should be done if they were evident from some other part of the deed. In the case of *Macpherson*, 1855; 17 D. 357; where the writer of an assignation, who was also one of the witnesses, was not described in the testing-clause to have been the writer, but who added to his signature as witness the words, "and writer hereof," it was held that the deed was duly tested. Notwithstanding this decision, however, the prudent course is to follow the general practice of accurately stating the writer's name and designation in the testing-clause. The testing-clause may be written by a different person from the writer of the body of the deed, and in such a case it was not necessary that the writer of the testing-clause should be mentioned. On this point see the case of *Lindsay* v. *Giles*, 1844; 6 D. 771. The correct practice, however, is also to insert the name and designation of the writer of the testing-clause where it is filled up by a different person. Where a deed was partly printed or engraved or lithographed and partly written, it was enough to design the

person who had inserted the written part of it. In a holograph writing it was usual to state that it was written with the granter's own hand; but this was not essential. When the deed consisted of more than one *sheet*, the number of pages on which it was written required to be stated in the testing-clause. The next point calling for observation is the *subscription of the granter*. Where the deed consists of more than one *sheet* it must be signed on each page by the granter, and any addition or alteration, by way of marginal note or otherwise, must be authenticated by the signature of the granter and noticed in the testing-clause. It has been long settled that where the deed is engrossed on one sheet only, though extending over more than one page, it is quite enough that the last page be signed by the person executing it: but the general practice is to sign each page. In signing a deed, the granter adhibits his usual signature merely; that is to say, it is not necessary that he write his full Christian name and surname unless that is his usual mode of signing documents. Where the granter cannot write, a *deed* executed by a mark is ineffectual. The only mode (known to the law) in which a person who could not write could execute a deed was—observe we are speaking of the practice prior to 1st October, 1874—that it should be subscribed by two notaries on behalf of the granter in the presence of four witnesses, who must know that the notaries are duly authorised to sign, this authority being generally evidenced by the granter touching the pens of the notaries and requesting them to sign for him. Where the party himself subscribed, two witnesses above the age of fourteen (who, after the passing of the Titles to Land Consolidation Act, 1868, might be females) required to be present to attest the signature. The witnesses signed the last page of the deed at the left-hand side, adding after the signature the word "witness." Where several granters signed at the same time, the witnesses subscribed only once; but if the deed was signed at different times the witnesses required to subscribe at each separate attestation. An accurate designation of the witnesses must be

contained in the testing-clause by inserting the full names, occupations, and places of abode. A misnomer of the witnesses in the testing-clause, or an erroneous designation of them, rendered the deed a mere nullity. The witnesses should always know the party executing a deed; at least they ought to know that the party designed in the deed is the party who executes it. Difficulty frequently arises in practice from the witnesses not knowing the party whose signature they attest; and in cases where the signature is challenged, the evidence of such witnesses is useless. Too much importance, therefore, cannot be attached to this matter. The insertion of the place and date of subscription of a deed is not a statutory solemnity, but it is the invariable practice to mention them in the testing clause; and they ought to be stated with accuracy. The effect of a deed may depend upon its date. In the case of deeds partly written and partly printed or engraved or lithographed, the date, if any, requires to be stated in the testing-clause.

When a deed, such as a bond of credit, is signed by a party resident in England, it is usual to execute it according to the forms required by the law of England as well as those in use in Scotland. In addition to the signature of the granter, the deed must be authenticated by his seal, and delivered as his act and deed in the presence of two witnesses. A probate is written on the left-hand side of the deed, in the following terms:—"Signed, sealed, and delivered by the above-named A B, before and in presence of." The witnesses sign immediately under it, adding to their signatures their places of residence and professions. The following is an example of this mode of execution:—

JOHN SMITH. (SEAL.)

Signed, sealed, and delivered by the above-named John Smith before and in presence of

ANDREW PEARSON, *of Newcastle, Banker.*
JAMES WILSON, *of Newcastle, Warehouseman.*

**The Changes introduced by the Conveyancing (Scotland) Act, 1874.**—Among other alterations, that Act provides that all deeds, instruments, or writings may now be validly executed by the subscription of the granter, before two witnesses (who may be females), who must be either named or designed in the body of the deed or the testing-clause, or their designations must be appended to or follow their subscriptions. But it is not essential (though advisable) that such designation be added by the witnesses themselves, for it may be made at any time before the document shall have been recorded in any register for preservation, or shall have been founded on in any court. If in addition the deed be subscribed by the granter on the last page in the case of a deed on one sheet only, or on each of the sheets or pages in the case of a deed written on more than one page, the deed is probative. It is further provided by that Act that no deed subscribed by the granter, and bearing to be attested by two witnesses, shall be invalid because of any informality of execution, but the burden of proving the genuineness of the subscription lies on the person using or upholding the deed. The signature must be a proper signature. The use of a stamp which the granter may be in the habit of using in consequence of a difficulty in writing is not sufficient, *Stirling Stuart* v. *Stirling Crawford's Trustees*, Feb. 6, 1885, 12 R. 610. It is still the more prudent course to adhere in the preparation of all important documents to the solemnities in use prior to the passing of the Act of 1874, although in many instances the advantages conferred by the Act may be of essential benefit, and may prevent documents being set aside on comparatively trivial grounds.

As regards the execution of deeds by parties incapable of signing their name, whether from ignorance of the art of writing or physical incapacity through accident or disease, the Act above referred to legalises (without prejudice to the previous practice, which may still be followed) the subscription of *one notary and two witnesses*, or one Justice of the Peace and two witnesses, as sufficient execution by the granter. The witnesses

should hear the deed read over to the granter (and, we think, if need be, explained), and they should see or hear distinct authority given to such notary or justice of the peace to execute the deed on behalf of the granter. The necessary docquet to be written by such notary or justice is given below.

**Form of Docquet.**—"By authority of the above-named and "designed A B, who declares that he cannot write on account "of sickness and bodily weakness (*or*, never having been "taught, *or otherwise as the case may be*), I, C D (*design him*), "Notary Public (*or*, Justice of the Peace for the county of "  ), subscribe these presents for him, he having "authorised me for that purpose, and the same having been "previously read over to him, all in presence of the witnesses "before named and designed, who subscribe this docquet in tes- "timony of their having heard (*or*, seen) authority given to me "as aforesaid, and heard these presents read over to the said "A B."

It may here be mentioned that the parish minister can act as a notary as regards wills, or other testamentary writings, but only in his own parish. It is obvious, however, that recourse to the services of the parish minister should be had only where the services of a notary or a Justice of the Peace cannot be obtained.

**Persons who may Grant Deeds and come under Personal Obligations.**—A few observations may be offered as regards the persons who may grant deeds, and come under personal obligations. It is indispensable that the person who executes a deed should be capable of giving an *intelligent* and *voluntary* consent, and that he has sufficient knowledge to understand what he is doing or parting with by signing the deed. It is almost unnecessary to say, that a deed granted by a person under a legal incapacity, such as imbecility or nonage, is reducible by one having any interest; and the same observation

applies to all deeds executed through force, fear, fraud, or under essential error.

**Pupils and Minors.**—Incapacity from nonage applies to *pupils* and *minors*, who cannot grant deeds without the consent of their legal guardians. Pupils are incapable of signing any deed during the years of pupilarity, which, in the case of females, continues until the completion of the twelfth year; and in the case of males, till the completion of the fourteenth year. Deeds on behalf of pupils can be granted only by their father, as administrator-in-law, or, after his death, by their tutors, or by a factor *loco tutoris*, where no tutors have been appointed. The signature of a pupil to a deed is absolutely null, but the nullity of the deed cannot be pleaded by the person who has obtained the deed from him. The tutor of a pupil acts for him in all matters, but he cannot dispose of his ward's heritage, except with the special authority of the Court of Session, on showing that the sale is necessary. Minors—that is to say, persons above the age of fourteen, if males, and twelve, if females, and under twenty-one—have generally the same powers as persons of full age. Deeds granted by minors who have no curators, and by minors with consent of their curators, are valid, and only reducible on the ground of minority and lesion, if an action to set them aside be brought within four years of the minor attaining majority. Deeds granted by curators alone, or by a minor having curators, without their consent, are null, and reducible at any time within the forty years' prescription. A minor however, may carry on business or a trade; and bills, and other mercantile documents necessary for the carrying on of the business, are valid, though granted without the consent of his curators. All transactions with minors should be carefully undertaken; and it ought to be kept in view that, as in the case of pupils, deeds challengeable by minors are, nevertheless, binding on the other contracting parties.

**Married Women.**—1. *Common Law.*—On marriage two

rights arise to the husband in reference to his wife's property. The one is his *jus mariti*, which gives him the absolute power of disposal of her moveable property, unless his right be specially excluded by marriage-contract, or by the deed under which she succeeds. The other right is called the *right of administration*, which constitutes him his wife's curator, and renders necessary his consent to all deeds disposing of her own separate property, whether heritable or moveable, unless his right of administration be expressly excluded by contract.

The husband is liable for moveable debts contracted by his wife before marriage, and also for the interest on heritable debts due prior to the marriage; and if her heritable property has been conveyed to him, he is liable also for the wife's heritable debts. The husband, however, is not liable for furnishings to his wife while she lived in family with her father. If the debts contracted by a wife before marriage be not paid before the dissolution of the marriage by her death, the husband will not be liable for them unless so far as he shall be enriched by the marriage beyond a reasonable portion. A wife is not liable personally *stante matrimonio* for debts contracted prior to marriage, but her separate estate can be at once attached, and her personal liability revives on the dissolution of the marriage.

A married woman is incapacitated from selling, disposing of, or gifting her heritage, and also any moveable property belonging to her, from which her husband's *jus mariti* has been excluded, except with consent of her husband, but if his right of administration has been excluded or renounced, she may dispose of her separate property without his consent. It is usual, over and above the husband's consent to a deed by his wife conveying her heritage, to get her to ratify it in the presence of a magistrate and witnesses while her husband is not present. This is an oath by the wife that she has not been compelled through force or fear of her husband to grant the deed. But, notwithstanding of ratification by the wife, if it be the fact that she was really compelled by her husband to grant the deed, it will still be reducible on this being proved.

A wife can, without consent of her husband, dispose of her own property by will or *mortis causa* deed.

Personal obligations granted by a married woman are null, and cannot be used as grounds of diligence against either her person or her estate even after the dissolution of the marriage. The husband's consent does not validate such obligations. A married woman may, however, insist upon the other contracting party fulfilling the contract, and in that case she must perform her own part. To the above rule there are several exceptions. *In the first place*, the separate estate of a married woman may be made available to a creditor, where the subject of the debt has been applied for her own benefit, and is not such that the husband is primarily liable for it—*e.g.*, debts incurred to clear her separate estate of burdens, or for improvements upon it, and the expense of management of her separate estate, are held to be *in rem versum* of her estate, and recoverable out of it. *Secondly*, if she fraudulently holds herself out as unmarried, and so induce anyone to contract with her, she cannot repudiate the obligations she has undertaken. *Thirdly*, where a wife commits a crime for which she is fined, her estate may be attached in payment. *Fourthly*, if the husband be insane, outlawed, or resident abroad, the wife may carry on business, and grant personal obligations, which will render her and her estate liable to diligence; *vide Orme & Diffors*, 1833; 12 S. 149. *Lastly*, if a married woman sell her heritage and refuse to grant a disposition to the purchaser, he may bring an action of adjudication in implement against her.

2. *Statute Law.*—By the Conjugal Rights Act, 1861, and the Married Women's Property Acts, 1877 and 1881, various important alterations have been made on the law of husband and wife. It provides that a wife deserted by her husband may, at any time after such desertion, apply to the Court of Session* for an

* The Conjugal Rights (Scotland) Amendment Act, 1874 (on the narrative that the expense of procedure under the Act of 1861 prevents many persons from availing themselves of its benefits), grants to the Sheriffs of counties the necessary authority for putting the provisions of the latter Act into force (but see the Statute).

order to protect property which she has acquired or may acquire by her own industry, and property which she has succeeded to or may succeed, or acquire right to, against her husband or his creditors, or any person in or through his right. The petition is intimated in the Minute-Book of the Court, and executed against the husband in common form. The husband, or any of his creditors, may lodge answers to the petition. If no answers are lodged, the Lord Ordinary shall require evidence of such desertion; and, on being satisfied thereof, pronounce an interlocutor, giving to the wife protection of her property against her husband and all creditors or persons claiming under or through him. If answers are lodged, the Lord Ordinary may, on considering the same and hearing parties, allow a proof to them of their averments; and, if satisfied, after proof of the fact of such desertion, that the same was without reasonable cause, he shall pronounce an interlocutor giving to the wife protection as aforesaid, and shall appoint intimation thereof to be made in one or more newspapers published within the county within which the wife is resident, or in such other newspapers as he shall appoint.

The husband, or any creditor, who has *not* lodged answers, may apply to the Court by petition for a recall of the protection. The Lord Ordinary shall appoint such petition to be answered by the wife, and thereafter dispose of the application as he shall think just; but such recall shall not affect any right or interest onerously and *bona fide* acquired by any third party from the wife before said recall, which is to be published in the same manner as the order of protection. All interlocutors of the Lord Ordinary may be brought under review of either Division of the Court; but it is provided that, notwithstanding any reclaiming note, the protection shall take effect when intimated, unless the Lord Ordinary, at the time of pronouncing it, or within forty-eight hours thereafter, order that his interlocutor shall not take effect till the advising of the reclaiming note, or such other period as he may think fit. The order of protection, where there has been appearance by the husband, shall continue

operative until such time as the wife shall again cohabit with her husband; or until the Lord Ordinary, upon a petition by the husband, shall be satisfied that he has ceased from his desertion and cohabits with his wife; and the Lord Ordinary may require him to find security, for such period as may be appointed, that he shall continue to cohabit with her, and upon the Lord Ordinary being satisfied, and security found, if required, he shall recall the order of protection; but such recall shall not affect any right or interest acquired by the wife while the said order subsisted, which right and interest shall remain vested in her, exclusive of her husband's *jus mariti* and right of administration; nor shall it affect any right or interest acquired by a third party during such period, or any third party through or from her, while the said order subsisted; and until such order be recalled it shall not be competent for the husband to institute an action of adherence against his wife.

After an interlocutor of protection is pronounced and duly intimated, the property of the wife belongs to her as if she were unmarried, but the protection does not extend to property acquired by the wife, of which the husband, or his assignee or disponee, has, before the date of presenting said petition, obtained full and complete lawful possession; nor does it affect the right of any creditor of the husband over property which he has, before the date thereof, duly attached by arrestment, followed by a decree of furthcoming, or duly poinded, and of which he has carried through and reported a sale.

The order of protection, duly made and intimated, is declared to have the effect of a decree of separation, *a mensa et thoro*, in regard to the property, rights, and obligations of the husband and of the wife, and in regard to the wife's capacity to sue and be sued.

The Act also provides that after a decree of separation, *a mensa et thoro*, is obtained at the instance of the wife, all property which she may acquire, or which may come to or devolve upon her, shall be held and considered as property belonging to her, in reference to which the *jus mariti* and husband's right of

administration are excluded, and such property may be disposed of by her in all respects as if she were unmarried; and, on her decease, the same shall, in case she shall die intestate, pass to her heirs and representatives, in like manner as if her husband had been then dead. Should the wife again cohabit with her husband, her property shall be held to her separate use, and the *jus mariti* and right of administration of her husband shall be excluded in reference thereto; subject, however, to any agreement in writing made between herself and her husband. The wife shall, while so separate, be capable of entering into obligations, and be liable for wrongs and injuries, and be capable of suing and being sued, as if she were not married; and her husband shall not be liable in respect of any obligations or contract she may have entered into, or for any wrongful act or omission by her, incurred after the decree of separation, and during the subsistence thereof.

By the Married Women's Property Act, 1877, it is provided that "the *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman, acquired or gained by her after the commencement of this Act in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name, and shall also be excluded from any money or property acquired by her after the commencement of this Act through the exercise of any literary, artistic, or scientific skill, and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her own separate use, and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof." This Act also limits the liability of a husband for the antenuptial debts of his wife to the value of the property which he receives through her.

By the Married Women's Policy of Assurance Act, 1880, 43 & 44 Vict. c. 26, married women are enabled to effect policies on their own or husbands' lives, exclusive of the husbands' *jus mariti* or right of administration.

Further important alterations in favour of married women are made by the Married Women's Property (Scotland) Act, 1881, 44 & 45 Vict. c. 21, the latest statute dealing with the subject. This Act provides that where a marriage is contracted after the passing of the Act (18th July, 1881), the husband at the time of his marriage having his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, is, by operation of law, vested in the wife as her separate estate, and is not subject to the *jus mariti*. Any income of such estate is payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration is excluded; but the wife is not entitled to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate. Except in the case immediately after provided for by the Act, the wife's moveable estate is not subject to arrestment, or other diligence of the law, for the husband's debts, provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title) is invested, placed, or secured in the name of the wife herself, or in such terms as clearly distinguish the same from the estate of the husband. Any money or other estate of the wife, lent or entrusted to the husband, or immixed with his funds, is to be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied. Nothing in these provisions excludes or abridges the power of settlement by antenuptial contract of marriage. The rents and produce of heritable property in Scotland belonging to the wife are no longer subject to the *jus mariti* and right of administration of the husband. In the case of marriages which have taken place before the passing of the Act, the provisions do not apply where the husband has, before the passing thereof, by irrevocable deed or deeds,

made a reasonable provision for his wife in the event of her surviving him; and in other cases the provisions of the Act do not apply, except that the *jus mariti* and right of administration are excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act. All persons married before the passing of the Act may declare by mutual deed that the wife's whole estate, including such as may have previously come to the husband in right of his wife, shall be regulated by this Act; and on registration and advertisement of such deed, the estate is vested in her subject to the provisions of the Act; but no such deed is of any effect as against any debt or obligation contracted by the husband prior to the date of the deed being so advertised and registered. Where a wife is deserted by her husband, or is living apart from him with his consent, a judge of the Court of Session or Sheriff Court may, on petition, dispense with the husband's consent to any deed relating to her estate. The Act further provides that the husband of any woman who may die domiciled in Scotland is in future to have, by operation of law, the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, and that the children of any woman who may die domiciled in Scotland are in future to have the same right of legitim in regard to her moveable estate which they have in regard to that of their deceased father. The Act does not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donation between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women under the Married Women's Property Act, 1877.

## CHAPTER II.

### OF INTESTATE SUCCESSION TO MOVEABLES, AND THE OFFICE OF EXECUTOR.

VERY important alterations have been made in the law of intestate succession by the Act of 1855; but, before entering on a statement of its leading enactments, it may be proper to advert briefly to the Law of Succession.

Upon the death of a person possessed of moveable estate, it passes according to the will, if the deceased has left a settlement; and if the deceased has died intestate, it passes to the next-of-kin. In either case, the person taking up the succession is called the executor; if appointed in a will, executor-nominate; and if decerned to the deceased by the Sheriff, executor-dative. The title of executor, in every case, is completed by confirmation from the Sheriff of the county in which the deceased died domiciled, except in the case of a party dying abroad, or without any fixed or known domicile, when it is completed in the Sheriff-Court of Edinburgh. On obtaining confirmation, the executor has full title to uplift and administer the estate. If, however, a moveable subject, such as the stock of a public company or a life policy, is specially conveyed to the executor in a will, he has a good title to that particular subject without confirmation. By the Confirmation and Probate Act of 1858, as amended by the Sheriff-Courts Act, 1876, and the Customs and Inland Revenue Act, 1881, a most beneficial alteration has been made on the law as to confirming to a party deceased, possessed of moveable property in England or Ireland, as well as in Scotland. By the old law, confirmation only gave a title to property situated in Scotland; and, before the property in England or Ireland could be administered, the executor

required to take out probate, or letters of administration, in the English or Irish courts; but it is now competent to include in the inventory of any person, who shall have died domiciled in Scotland, all the personal property of the deceased within the United Kingdom; and on such confirmation being produced and sealed in the Probate Court of England or Ireland, as the case may be, the executor's title to the English or Irish property is complete; *vide* 21 & 22 Vict. c. 56, secs. 9, 12, 13; and 39 & 40 Vict. c. 70, secs. 41, 42, 43. A like privilege has been conferred in the case of parties dying domiciled in England or Ireland, having moveable property in Scotland. The probate of the estate of such persons may include the Scotch property; and, on its being produced in the Sheriff-Court at Edinburgh, and a certificate of its production written on it by the commissary-clerk, it has the same effect as if confirmation had been obtained in Scotland; *vide* sec. 14 of the Act of 1858, 21 & 22 Vict. c. 56.

**1. Dissolution of Marriage.** — On the dissolution of a marriage by the death of the husband, survived by children, the goods in communion—that is, the moveable property of the spouses, which is under the control of the husband *jure mariti* —are divided into three parts. One of these, called the *jus relictæ*, the law gives to the wife; another, called *legitim*, to the children; and the third, called the "dead's part" (heritable bonds, which, since 1868, are moveable as regards the succession of the creditor, are added to the dead's part), to the husband's next-of-kin—*i.e.*, his children. The husband may, however, dispose of the dead's part by will, even to the prejudice of his children; but in the absence of a marriage-contract or settlement, by which the rights of the wife and children are cut off by the acceptance of other provisions, the husband cannot, by any settlement he may make, defeat the rights of his wife and children to their legal provisions. If the marriage be dissolved by the death of the husband, *without* his being survived by children, the goods in communion are divided into *two* parts; the one going to the wife, as her *jus relictæ;* and the other to

the husband's next-of-kin, failing his having disposed of it by will. The wife is also entitled to *terce*; that is, the liferent of one-third of the husband's heritable property, *including* burgage subjects.*

Where the marriage is dissolved by the death of the wife, very important alterations have been made by recent legislation. Formerly, when a wife died, her next-of-kin, if there were no children, could demand from the husband one-half of the goods in communion; that is, one-half of the whole of his moveable property; but the Intestate Moveable Succession Act, 1855, provides that, where the wife predeceases her husband, her next-of-kin shall have no right to a share of the goods in communion. The husband, when a living child has been born of the marriage, is entitled to *courtesy*: that is, a right to continue during his life in the possession of all heritages to which his wife has succeeded in the capacity of heir, provided that a living child has been born, who is his mother's heir. This right does not extend to subjects conquest by the wife; that is, subjects acquired by her by purchase or donation during her life. The Married Women's Property (Scotland) Act, 1881, sec. 7, provides, that after the passing of that Act, the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have in that of their deceased father.

Another very important alteration has been made by the Intestate Moveable Succession Act as to the dissolution of marriage by the death of the wife. According to the old law, if the marriage was dissolved within a year and day by the death of either spouse, without a living child being born, the moveable funds were restored, as far as possible, to the parties to whom they originally belonged. But the Act provides that, though the marriage be dissolved within a year and day, the rights of parties shall be the same as if it had lasted for a longer period.

* The distinction between feu and burgage subjects is now abolished.

**2. Rules of Succession.**—Where a father dies intestate, leaving children, they, as next-of-kin of their parent, take the dead's part in addition to the *legitim*, and thus take equally among them the whole moveable property belonging to the father, subject to their mother's claim for one-third, if she be alive and has not renounced it. Where a child predeceases the parent, leaving lawful issue, such issue come in place of their parent, and take equally among them the share which would have fallen to the parent, if alive; but have no claim to a share in the *legitim*. The heir, provided he is also one of the next-of-kin, may insist upon collating the heritage with the moveables, and then sharing equally with the next-of-kin, and has no claim to a share of moveables unless he do so.

Where any person, dying intestate, predeceases his father, without leaving issue, his father has a preferable right to one-half of his moveable estate, the other half going to his brothers and sisters, if any, or their descendants. Where an intestate, dying without issue, is predeceased by his father and survived by his mother, she has a preferable right to one-third of the moveable estate, the other two-thirds going to the deceased's next-of-kin.

Where an intestate, dying without issue, and whose father and mother have predeceased him, does not leave any brother or sister german, but leaves brothers and sisters uterine, or descendants from them, they have right to one-half of the moveable estate.

The lines of succession are—first, descendants; next, collaterals; then ascendants, with their collaterals. Except, as mentioned above, the maternal relatives of an intestate are excluded from his succession.

**3. Office of Executor.**—In the case of a testate succession, the parties named executors in a will are confirmed in preference to all others; next in order are universal disponees under a settlement; third, the next-of-kin of the deceased; fourth, the widow; fifth, creditors of the defunct; and lastly, special legatees. In the case of intestate succession, the parties en-

titled to be deemed executor are—first, the next-of-kin; second, the widow; and third, creditors.

There is this difference betwixt an executor-nominate and an executor-dative, that the former does not require to find caution for his intromissions, while the latter requires to find caution to the full amount of the inventory, unless the caution is restricted by the Sheriff on cause shown. The executor is merely a trustee for all concerned, and, as such, has no beneficial interest in the estate. An executor-creditor, however, is not a trustee for all interested, but proceeds only for payment of his own debt.

The office of executor-nominate being one of trust, is personal to the party appointed to it, and does not descend to executors named by him. On the death of the executor without having realised the estate, the Sheriff will appoint an executor-dative *ad non executa*. Where the funds of the deceased have been reduced into possession by the executor, but not distributed by him, the parties beneficially interested may apply to the Court of Session for the appointment of a judicial factor to administer the estate. Where, therefore, funds are deposited in a bank in name of the executor of a party deceased, the bank is not in safety, on the death of such executor, to pay funds to *his* executors, because if a judicial factor were afterwards appointed, the bank might have to pay the money a second time. In practice, however, where the balance is trifling, banks pay it to the parties beneficially interested on obtaining the consent of the executors' representatives.

This rule, however, does not always hold in the case of an executor-dative. Where the executor-dative is not a trustee, but has the sole beneficial interest in funds or property standing in his name as such, they pass to *his* executor; and, on expeding confirmation, such executor has a good title to uplift and discharge them.

When payment is made by a banker under a confirmation, it is necessary to see that the particular fund has been included in the inventory, no one being warranted to pay unless the asset

in his hands is confirmed. In a case of this kind, which happened with the Royal Bank, they were found liable to pay a second time funds in their hands which had not been included in the inventory of the estate of the party in whose name they were deposited.

**Executors-Dative of Estates under £300.**—Increased facilities for the benefit of poor persons have been provided for confirmation to estates which do not exceed £300, by the Acts 38 & 39 Vict. c. 41 (intestate estates), and 39 & 40 Vict. c. 24 (testate estates), both amended by 44 Vict. c. 12, sec. 34. Under these Acts, where the whole personal estate and effects of deceased, without any deduction for debts or funeral expenses, does not exceed the value of £300, whoever may be the applicant for representation, and wheresoever the deceased may have been domiciled at the time of death, the Commissary Clerk or Sheriff Clerk, if satisfied as to the identity and relationship of the applicant, fills up an inventory, takes the oath of the applicant thereto, and expedes confirmation, the fees in no case exceeding fifteen shillings. Where the estate exceeds the value of £100, the stamp duty payable on the inventory is fixed at thirty shillings.

**Office of Trustee.**—The Trustee (Scotland) Amendment Act, 1884 (47 & 58 Vict. c. 63), provides that in the construction of the Trusts Acts, 1861 to 1884, "Trust" means and includes any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by resolution of any Corporation or public or ecclesiastical body, and the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise; and "Trustee" includes tutor, curator, and judicial factor.

*Gratuitous Trustees* are those who receive no pecuniary or other consideration, and are under no obligation without special acceptance to discharge the duties. The expression also includes trustees who are appointed or who hold *ex-officio*, but it does not include a trustee for a trading company. By the Trusts Act, 1867, certain useful powers are conferred on gratuitous trustees, amongst others—

1. To appoint factors and law-agents, and to pay them a suitable remuneration.
2. To discharge trustees who have resigned, and the representatives of trustees who have died.
3. To grant leases of the heritable estate, not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals, and to remove tenants.
4. To uplift, discharge, or assign debts due to the trust-estate.
5. To compromise or to submit and refer all claims connected with the trust-estate.
6. To grant all deeds necessary for carrying into effect the powers vested in the trustees.
7. To pay debts due by the truster, or by the trust-estate, without requiring the creditors to constitute such debts where the trustees are satisfied that the debts are proper debts of the trust.

On application to the Court, power may be granted to the trustees—(1) to sell the trust-estate, or any part of it; (2) grant feus or leases of the heritable estate, or any part of it; (3) to borrow money on the security of the trust-estate, or any part of it; (4) to excamb any part of the trust-estate which is heritable. For the other important powers and immunities conferred upon the trustees reference may be made to the Statute.

By the Act 50 & 51 Vict. c. 18 trustees are further empowered to make abatement or reduction, either temporary or permanent, of the rent stipulated in any lease of lands let for agricultural or pastoral occupation, or for both purposes, and to accept renunciations of leases of any such subjects.

The powers of trustees to invest trust-funds, are regulated by the Act of 1884 (47 & 48 Vict. c. 63), sec. 3, and include—(A) the purchase of (1) any of the Government stocks, public funds, or securities of the United Kingdom; (2) stock of the Bank of England; (3) any securities, the interest of which is guaranteed

by Parliament; (4) debenture stock of railway companies in Great Britain, incorporated by Act of Parliament; (5) preference, guaranteed, lien, annuity, or rent-charge stock, the dividend on which is not contingent on the profits of the year, of such railway companies in Great Britain as have paid a dividend on their ordinary stock for ten years immediately preceding the date of investment; (6) stock or annuities issued by any municipal corporation in Great Britain, secured on rates or taxes levied under Act of Parliament; (7) East India stock or Colonial Government funds approved by the Court of Session, and also bonds or documents of debt of any such government, approved as aforesaid, provided such stocks, bonds, or others are not payable to the bearer; (8) feu-duties or ground-annuals; (B) in loans—(9) on the security of any of the stocks, funds, or other property aforesaid; (10) on real or heritable security in Great Britain; (11) on debentures or mortgages of railway companies in Great Britain incorporated by Act of Parliament; (12) on bonds, debentures or mortgages, secured on rates or taxes levied under the authority of any Act of Parliament, by Municipal Corporations in Great Britain authorised to borrow money on such security; (13) on Indian railway stock, debentures, bonds or mortgages on which the interest is permanently guaranteed by the Indian Government and payable in sterling money in Great Britain.

Trustees are not entitled to invest the trust-funds, or to leave them invested in a trading company, unless authorised by the trust-deed. If, when duly authorised, they invest the trust-funds in a trading company, they become partners, and are individually liable as such, either in a question with creditors of the company or in the way of relief to their co-partners.

At common law the surviving trustee or executor can administer the trust.

## CHAPTER III.

### BILLS AND PROMISSORY-NOTES.

We are now to consider a class of writs which are altogether peculiar in the legal privileges which they possess. The advantage which commerce has reaped from the introduction of Bills of Exchange cannot well be estimated. From a small beginning they have grown into a vast and widespread system, upon which the trade of the world may be said to be based. Bills of exchange were originally called into use by the great hazard and inconvenience experienced in transmitting coin from one country to another, for the purchase of produce or the payment of debts. In the Middle Ages, the great variety of coins, and the limited area within which they circulated, made it necessary for buyers to exchange the coins of their own district for those of the place of the purchase. Merchants, accordingly, found it advantageous before leaving home to obtain from a money-changer an order upon his correspondent in the town to which they were bound, to pay them a sum of money in the coin of that town; and they obtained this order or draft in exchange for a sum paid in coins of the place of their residence. Bills thus came to be called Bills of exchange. The great success following upon the use of Bills of exchange for the settlement of transactions between the subjects of different countries led to the introduction of Inland Bills for carrying on the operations of commerce between different parts of the same country. Although at first inland bills were limited to mercantile transactions, they have now been extended in their application far beyond their original object, and are employed for the constitution of all kinds of debt. The bill, while simple in its form, and exempt from all solemnities of execution, is privileged, in respect that the obligation contained

in it is enforced by the strictest and most summary execution known to the law.

Since the publication of the last edition of this work, the Bills of Exchange Act, 1882, has codified the greater portion of the common law and statutory law on the subject. It has, however, provided that the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques. In some points, the laws of the three countries have been assimilated; in certain others they remain dissimilar (*e.g.*, the presentation of a bill to a drawee still operates in Scotland, but not in England, the assignation of a debt due by the drawer to the drawee). In certain points, the law common to both countries has been altered. Certain points on which doubt was felt in practice have been set at rest by direct enactment.

It has been thought the better course in these circumstances to re-write this chapter so as, if possible, to present the law as it is now settled by the Act and the few decisions upon it which have occurred. The order of previous editions of the work has, however, in great part been followed.

A bill of exchange as defined by the Act, section 3, is "an unconditional order in writing addressed by one person (the drawer) to another (the drawee), signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or for the order of a specified person, or to bearer." An instrument which does not comply with these conditions is not a bill, and, in like manner, an instrument which orders any act to be done in addition to payment of money is not a bill. If the drawee intends to "accept" the bill, that is to signify his assent to the requirement of the drawer, he must signify such acceptance in writing on the bill. His signature on the bill, with or without such words as "accepted," will signify such assent.

A promissory-note is an unconditional promise in writing

made by one person to another signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer. Promissory-notes were at one time not allowed the same privileges as bills, but were subsequently put upon the same footing by the Acts 12 Geo. III. c. 72 and 22 Geo. III. c. 18. Such points of distinction as exist in regard to their treatment under the Act of 1882 will be noticed as we proceed.

Bills are divided into inland and foreign bills. That alone is an inland bill, all others being foreign, which is, or on the face of it purports to be (*a*) both drawn and payable within the British Islands (*i.e.*, Great Britain and Ireland, Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of the Queen); or, (*b*) drawn within the British Islands upon some person resident therein. A bill may be treated by the holder as an inland bill unless the contrary appear on the face of it.

**Essentials of a Bill.**—The essentials of a bill or note are that it be (1) in writing, and (2) duly stamped; that it must (3) contain an unconditional order or promise to pay. Thus an order to pay a sum out of a particular fund will be conditional, for it depends on the existence of that fund. But if the order to pay be unqualified, it will not be held to make it conditional that the bill points out a particular fund out of which the drawee may reimburse himself, or points out a particular account to be debited with the amount, or gives a statement of the transaction which gave rise to the bill. These things are not germane to the bill, but they introduce no condition into it. (4) The bill or note must order or promise payment of a sum of money. (5) The sum must be certain in amount. (6) The drawee must be named, "or otherwise indicated in the bill with reasonable certainty." There may be two or more drawees, but the bill must not be addressed to them alternatively or in succession; such a document would not be a bill of exchange. (7) The money must be either payable on demand,

or at a particular date. It will be payable on demand, if it bears to be so, or if no time of payment is expressed. It will be payable at a fixed or determinable future time if a time is expressed, or if it be payable at a fixed period after date or sight, or at a fixed period after an event which is certain to happen.

The person to whom the payment is to be made must be the bearer, or payment to the order of a specified person may be required. In the latter case the payee must either be named or otherwise indicated with reasonable certainty.

If a document contain the essentials of a bill, as above explained, in intelligible words, it is a bill, no set form of words being required by the law. From the fact of its being a bill there follow certain privileges which are (1) the non-requirement of legal formalities in execution, (2) negotiability and (3) summary diligence in virtue of the privilege of negotiability. Bills and notes pass from hand to hand by indorsation, and delivery, or in the case of a bill payable to bearer by simple delivery. The party thus acquiring right to the bill may again transmit the bill to another, and the bill may be thus transmitted till a protest is recorded, after which a formal assignation is required of the bill and diligence. Every indorser is liable to the holder conjunctly and severally with the drawer and acceptor, except where the bill is indorsed "without recourse," and where the last indorser is called upon to pay he may go back upon the previous indorsers and the drawer, as well as upon the acceptor. Bills, when they become due, must be dealt with according to certain rules which ought to be strictly adhered to by the holder, as the value of the obligation may be greatly impaired, or even altogether destroyed, by any deviation from them.

The Act of 1882, it should here be remarked, has deprived the holders of bills of one privilege which lawyers and bankers regarded so highly as to attribute to it much of the convenience and credit which bills possessed. There is a presumption that the sum in the bill is due to the holder, and if the debtor desires to rebut that, he will still, in the general case, have to consign the sum, or find caution such as the Court may fix. But

formerly the proof that the sum was not due was limited to the writ or oath of the holder. The opinion was, however, even before 1882 expressed by Lord Mure, and concurred in by Lord President Inglis and Lord Deas, that wherever the averments of parties on record, as explained or admitted by the holder of a bill suing upon it, were such as to show that the bill came into the possession of the holder through some irregular dealing, and not in the ordinary course of business, or were such as to lead to the inference that no actual value was given for the bill at the time, or wherever the special circumstances in which the holder became possessed of the bill, as admitted or explained by him, were such as rendered it desirable for the ends of justice that the enquiry into the facts should not be limited to the writ or oath of the holder, the Court would allow a proof, before answer, of the averments; *Ferguson Davidson & Co.* v. *Jolly's Trustees*, 1880; 7 R. 500. Now parole evidence of any fact relevant to the question of liability on a bill, note, or cheque is admissible.

Such are generally the nature and privileges of bills, but it will be proper to examine in detail the various parts and the manner of negotiating and obtaining payment of bills. It is necessary in doing so to bear in mind what has been already stated with regard to the granting of deeds—that no party will be bound by a bill who labours under any legal incapacity to enter into contracts. To take a recent example—a married woman cannot make herself liable as party to a bill. *M'Lean* v. *Angus Brothers*, 2nd February, 1887; 14 R. 448.

**The Stamp.**—Inland Bills in order to be valid must be written upon stamped paper. In this respect they are peculiar, as almost all other deeds though written on plain paper may be stamped within a certain number of days without payment of a penalty and may be stamped at any time on payment of a penalty of £10. Bills, however, cannot be stamped after they are written out. The duty of one penny on a bill for the payment of money on demand may be denoted by an adhesive

stamp. In the case of other Inland Bills the bill must be written on a paper previously impressed with a stamp. Certain stamps are specially denoted for bills. If a bill be written on a stamp not so denoted, it may be rectified on payment of a penalty, provided the stamp used be of sufficient value. It is no objection to a bill that it is written on a stamp of greater value than what is necessary if the stamp be of a proper denomination. It is also to be kept in view that, under the Stamp Acts, any material alteration made on a bill after being written out, signed, and delivered, may invalidate the instrument as constituting a new bill. As regards bills drawn or made out of the United Kingdom, every person into whose hands such bill comes in the United Kingdom before it is stamped, must, before presenting for payment, indorsing, transferring, negotiating, or paying such bill, affix an adhesive foreign bill stamp and cancel the same. The holder cancels the stamp by writing on or across the stamp the name or initials of himself or his firm, together with the true date of his so doing, under a penalty of £10. The Stamp Act, 1870, now regulates the mode of cancelling adhesive stamps; and as regards foreign bills it makes it competent for any holder to cancel the stamp as if he were the person first negotiating the bill. But presentation without a stamp does not involve nullity, and, therefore, in a case in which an action was raised to recover the amount in a foreign promissory-note which was properly stamped at the date of the action, it was held to be no good defence to aver that when the note was originally presented for payment in the United Kingdom it was unstamped. *Broddelius* v. *Grischotti*, 4th March, 1887; 14 R. 536.

Bills or Notes for less than twenty shillings are void, 8 & 9 Vict. c. 38, sec. 16. Where a bill is drawn in a set and is duly stamped (see *infra*, p. 55), the others of the set, unless separately negotiated, are exempt from duty.

**Date of the Bill.**—It does not render a bill invalid that it has no date, Act of 1882, sec. 3. But it is of great importance

that every bill be dated, since if without a date it loses the privilege of summary diligence. Nor does it render a bill invalid that it is dated on a Sunday, nor that it is ante-dated or post-dated. If it bear a date that date shall be presumed to be its true date till the contrary be proved (sec. 13). If a bill payable at a fixed period after date is issued undated, or if the acceptance of a bill payable at a fixed period after acceptance is undated, any holder may insert the true date of issue or acceptance, and the date will be payable accordingly. The mention of the place from which the bill is issued is not essential; nor is the mention of that at which the bill is payable. If it should be necessary to prove the place of drawing or payment, parole evidence is competent to do so.

**Sum in the Bill.**—The amount written in words in the body of the bill regulates the value of it. It is customary, but not essential, to place the value in figures at the top. Where there is a discrepancy between the sum as given in words and that as given in figures, the amount in words is the amount payable. When there is an ambiguity in the words, the sum in figures may be used to explain it; *Gordon* v. *Glass*, 3rd June, 1848; 10 D. 1129. For instance, if in writing the sum in the body of the bill, the word "pounds" were omitted the sum superscribed would be of material use in support of what was really meant. In England it has been held that a bill for "twenty-five, seventeen shillings and threepence," omitting the word pounds was good for £25, 17s. 3d.; and in Scotland it was decided, in *Gordon* v. *Glass* (*supra*), that summary diligence could pass on a bill having a similar omission of the word "pounds."

The sum payable must be certain. It will still be a sum certain though it be to be paid with interest, or by instalments, or with a provision that if any instalment be not paid the whole shall become due, or if it be to be paid according to a rate of exchange indicated in, or to be ascertained as directed by, the bill. When no rate of interest is specified on an inland bill, 5 per cent. interest will be due. If "bank interest" were specified the

bill or note would not be good, since it would then be impossible to say the sum was certain, for extraneous evidence would be required in order to show the sum payable. *Tennant* v. *Crawford*, 12th January, 1878; 5 R. 437. The interest, unless the bill otherwise specify, runs from the date of the bill. If the bill is undated, interest runs from the date it was issued.

**Term of Payment.**—The practice is to make the bill bear a term of payment—*e.g.*, "on demand," "sixty days after date," or the like. It will be recollected that by the definition of a bill it must be payable at a "fixed or determinable future time." However remote the term of payment may be, if it is certain to arrive, the bill would be sustained, but if indefinite, such as a marriage or a succession to an inheritance, it would be a bad bill. A bill in which no time for payment is expressed, is payable on demand (sec. 10), a term synonymous with the terms "at sight," and "on presentation." The term of payment is in that case "determinable," as it is also in the case of a bill payable at a fixed period after sight or after a specified event which is certain to happen, sec. 11.

**Payee's Name.**—Sec. 7. It has already been seen that a bill may be payable to bearer, or, to the order of a specified person—*i.e.*, a person named *in the bill itself* or indicated *in it*, "with reasonable certainty." An instance of indication of the payee with reasonable certainty is found in a bill payable "to my order," where the signature of the drawer supplies the certainty required. If a bill be written out with a blank for the payee's name, the person in possession of it has *primâ facie* a right to fill in a name, but if there be no blank for that purpose there would be no bill. It would neither be a writing in favour of the bearer nor of any specified person. Two or more persons jointly may be payees of a bill. If so, it must be presented for payment by, or on behalf of them all, and be indorsed by, or on behalf of them all. Or a bill may be made payable in the alternative to one payee or another, or one or some of several

payees. A bill may also be payable to the holder of an office for the time being. But if so, and the holder of the office be not also named in it, summary diligence could not be done upon it, since extraneous evidence would be required to establish that the person specified was the person to whom it was payable. *Fraser* v. *Bannerman*, 21st June, 1853; 15 D. 757.

Sometimes a bill is made payable to a fictitious or non-existing person. If this be so, the bill may be treated as payable to bearer. A promissory-note may, since the passing of the Act of 1882, be made payable to one of two or some of several payees.

**Place of Payment.**—It is common for convenience of parties to insert in bills a place of payment. It does not render a bill invalid if this be not done. The place of payment, however, is often of great practical importance with regard to the treatment and negotiation of a bill. The acceptance, for example, may specify a particular place at which, only, the acceptor engages to pay the bill. This is called a local acceptance. If the bill specifies a place of payment, or if the acceptance is a local acceptance, the bill must be presented at the place mentioned. If there be no place of payment specified, but the address of the drawee or acceptor is given in the bill, the bill must be presented at that address. If no place is specified and no address is given, the bill must be presented at the drawee's or acceptor's place of business, if known, and, if not, at his ordinary residence, if known. In any other case proper presentment is made if the bill be presented to the drawee or acceptor wherever he can be found, or if it be presented at his last known place of business or residence. If a bill has been presented at the proper place, and, after the exercise of reasonable diligence, no person authorised to pay or to receive payment can be found there, no further presentment is required. If a bill is drawn upon or accepted by two or more persons, who are not partners, and no place of payment is specified, presentment must be made to them all; and where the drawee or acceptor is dead, and no place of payment is specified, presentment must be made to the personal representative, if such

there be, and if he can be found. Where authorised by agreement or usage, a presentment through the post office is sufficient. These provisions, which are contained in secs. 19 and 45 of the Act, have set at rest certain doubts formerly existing as to the proper course to be pursued where no place of payment was mentioned, and there was any difficulty about personal presentment to the acceptor.

**Effect of Drawing a Bill.**—The bill when drawn may be delivered to the payee already accepted by the person to whom it is addressed. More commonly, it is delivered unaccepted, leaving it to the payee to get it accepted. By drawing it and delivering it to a payee, the drawer engages that if it be duly presented to the payee it will be accepted and paid, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it. But this is subject to the condition that if it is dishonoured the steps requisite on dishonour be duly taken. What these steps are, will be detailed hereafter. If he be called upon to fulfil his contract to compensate such a holder or indorser he will have to pay him the amount of the bill with interest at five per cent., from the time when it ought to have been paid, and the expense of taking the necessary steps of noting and protesting the bill. In drawing the bill, however, the drawer may express it so as to contain words indicating an intention that it be not negotiable, in which case it is valid only between him and the acceptor and payee, and cannot be indorsed away to another; or he may introduce such words as "without recourse," negativing or limiting his liability to the holder. Or he may, on the other hand, waive some or all of the holder's duties towards himself. He may also insert the name of a person to whom the holder of the bill may resort in case of need, that is to say in case the bill is dishonoured by non-acceptance or non-payment. Such a person is called a "referee in case of need." The holder may or may not resort to him as he thinks fit. The effect of drawing a bill upon a drawee who has funds in his hands belonging to the drawer is, in Scotland, that the bill

operates as an assignation of the sum in the bill in the holder's favour; and this assignation dates from the time when the holder presents the bill to the drawee. Act, sec. 53, and *British Linen Co. Bank* v. *Carruthers*, 1883; 10 R. 923. The bill is an order to pay addressed to the drawee who has the fund. If he has it when the bill is presented to him he must thereafter hold for the payee to whom it has been assigned by the bill. If, having funds of the drawer in his hands, he refuse to accept, a protest should be taken for non-acceptance. The holder will thus have an intimated assignation of the funds in his favour, and be preferable to a subsequent arresting creditor of the drawer. The funds would be recovered not by any diligence on the bill on which the drawee's name would not be, but by an ordinary action. This law, which was the common law in Scotland, is preserved in Scotland by the Act of 1882. But it must be observed that the Act has not made it law outside Scotland. A bill is not in England an assignation of funds in the drawee's hands.

**Acceptance.**—We have already seen that the acceptance of the bill is the drawee's signification of his assent to the drawer's order to pay money, and that it must be written, not on a separate paper, but on the bill itself. The mere signature of the drawee is sufficient, but frequently the word "accepted" is prefixed. The only person who can accept is the drawee or an agent acting per procuration for him.* If he accept the bill and deliver it accepted to the person entitled to it, or gives him notice that he has accepted it, he enters into a contract to pay it. His acceptance may be "general"—*i.e.*, an assent without qualification to the drawer's order, or it may be qualified. For example, it may be qualified by a condition on which payment is to depend. In that case it would be necessary for the holder to prove that the condition had been fulfilled, and the bill would not therefore warrant summary diligence. We have also seen

* Except that *with the holder's consent* a referee in case of need or an acceptor for honour upon protest, may accept.

already that it may be "local." It may also be qualified as to time. Or, there may be several drawees, and the qualification may consist in its being an acceptance by one or more of them, but not all. The holder may refuse to take a qualified acceptance, and treat the bill as dishonoured. If he take one without the express or implied authority of the drawer and indorsers, his taking it will discharge them. Their assent will be implied from their silence beyond a reasonable time after notice to them that the qualified acceptance has been taken. The acceptance may be to pay part of the bill only. In that case it is necessary to give the drawer and indorsers, if any, notice, and if the bill be a foreign one to protest it as to the balance.

Acceptance can only be by the addressee or by one accepting for honour. Any other party indorsing a bill is liable only to subsequent holders; *Walker's Trustees* v. *M'Kinlay*, 1880, 7 R. (H.L.) 85. A person accepting a bill as co-obligant is truly a cautioner, *Hay & Kyd* v. *Pourie*, 1886, 13 R. 777. An acceptor may accept a bill even after it is overdue. He may also accept one by merely writing his signature on a bill stamp and delivering it to another for the purpose of being filled up as a bill. This will, *prima facie*, be authority to fill it up for any amount the stamp will cover. This must, however, be done within a reasonable time. In like manner, a person in possession of a bill which is wanting in any material particular is, *prima facie*, entitled within a reasonable time to fill it up in any way he thinks fit.

An acceptance does not require to be dated, the date of the bill being held to be the date of the acceptance. When, however, the bill is payable so many days after sight, or at some other currency running from the date of the acceptance, the date of acceptance fixes the date at which it is payable, and the acceptor should date it. If he does not, the holder may insert the true date. A bill accepted at a banker's is a constructive authority by the acceptor to the banker to pay the bill on his account. In the *British Linen Co.* v. *Rainey's Trustees*, 1885, 12 R. 825, it was held that a bill accepted "payable at" a

banker's on presentment operated as an intimated assignation of the funds of the acceptor in the banker's hands. A drawee is bound to accept a bill drawn upon him if he have expressly or impliedly undertaken to do so.

**Acceptance for Honour.**—It sometimes happens that a drawee who has no funds belonging to the drawer, or a third party, where the drawee has refused to accept or has absconded, accepts the bill for the honour of the drawer, that is, to prevent the bill from being dishonoured and the drawer's credit from being injured. This is called acceptance for honour, *supra* protest; because the nature of the acceptance is embodied in a notarial instrument. It may be done for the honour of another person liable on the bill than the drawer, but if it do not expressly state for whose honour it is made, it is deemed to be for the honour of the drawer. It can take place only when a bill has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, and the consent of the holder is required to the intervention. It must be written on the bill itself, and indicate that it is an acceptance for honour, and the acceptor for honour must sign it. The person for whom it is done must be liable on the bill, and the acceptor for honour must not be liable on it at the time of the acceptance for honour. The acceptor for honour engages by so doing to pay the bill if the drawee does not do so, provided that it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts. He is liable to the holder and all parties subsequent to the party for whose honour he accepts, and it must be presented to him for payment without undue delay. When a bill of exchange is dishonoured by the acceptor for honour, it must be protested for non-payment by him.

Similarly where a bill has been protested for non-payment, any person may intervene and pay it, *supra* protest, for the honour of any party liable thereon. The payment for honour, in order to operate as such and not as a mere voluntary payment

must be attested by a notarial act of honour, founded on a declaration made by the payer. Where two or more persons offer to pay a bill for honour, the person whose payment will discharge most parties to the bill has the preference. All parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to the rights and duties of, the holder as regards the party for whose honour he pays and all parties liable to him. On payment, the payer for honour is entitled to the bill and the protest.

From its nature a promissory-note is not capable of being accepted or presented for acceptance.

**Presentment for Acceptance.**—When a bill is payable after sight, it is necessary to present it for acceptance in order to fix the maturity of it; and where a bill expressly stipulates that it shall be presented for acceptance, or where it is drawn payable elsewhere than at the place of residence or business of the drawee, it must be presented for acceptance before it can be presented for payment. But in other cases no presentment for acceptance is necessary, and the bill may simply be presented at maturity for acceptance and payment. But in practice a banker holding an unaccepted bill gets it accepted without delay. And if a banker or other agent gets a bill forwarded to him with express instructions to present it for acceptance and fails to do so, he will be held liable for its contents; *Dunlop* v. *Hamilton*, 1810; 15 F.C. 497; *Van Dieman's Land Bank* v. *Victoria Bank*, L.R., 3 P.C. 526. This is on the principle that acceptance lends greater security to the bill. In the cases above specified, where presentment for acceptance is necessary, the presentment must be made within a reasonable time from the time when the holder came into possession of the bill, having regard to the nature of it, the usage of trade, and the facts of the case. It must be made by the holder, or on his behalf, to the drawee or some person authorised to accept or refuse to accept for him, and it must be done at a reasonable

hour on a business day before it is over-due.* "Reasonable hours" means, in the case of a banker, bank hours; in the case of a merchant, business hours; when he is not in such business, a Court must determine whether the time was reasonable. The drawee has the bill left with him for twenty-four hours, according to the usual custom in this country, but the time depends on the custom of the place of presentment; this is that he may have time to say whether he will accept it or not. If not accepted within the customary time, the bill must be treated as dishonoured. Presentment, where necessary, must be made, even if the holder does not expect that the bill will be accepted; but it is excused if the drawee is dead or bankrupt (though it may be made to his personal representative or his trustee), or where, with reasonable diligence, he cannot be found.

If acceptance be refused, the bill must be treated as dishonoured. When it is so dishonoured a right of recourse arises against the drawer and indorsers. No presentment for payment is necessary.

**Subscription of the Parties.**—It has been mentioned that the drawer and acceptor must sign the bill or acceptance. A signature in a trade or assumed name is equivalent to the party's own name. The signature need not be written with his own hand, but it is sufficient if it be written by some other person acting by or under his authority; a person so acting signs A B, *per* C D, or *p.p.* A B, C D. Such authority may be proved by parole, but a bill so signed will not warrant summary diligence. When the party cannot write, subscription by a notary or a justice of the peace in presence of two witnesses, in terms of the Conveyancing Act, 1874, will be sufficient to entitle the

* Non-business days are in Scotland—Sunday, New Year's Day—If this day falls on a Sunday, then on the next following Monday; Good Friday; First Monday of May and August; Christmas Day, if the day falls on a Sunday then the next following Monday. In England and Ireland—Sunday, Good Friday, Easter Monday, Monday in Whitsun Week, First Monday in August, Christmas Day, 26th December, and when 26th December falls on a Sunday then the Monday following.

bill to all its privileges. The signature may be by initials, if that be proved to be the party's customary method of signing, but summary diligence cannot be done on a bill so drawn or accepted. A corporation may sign by sealing with the corporate seal, or it may give authority to certain officials to sign for it. As to companies incorporated under the Companies Acts, a bill or note is deemed to have been made, accepted or indorsed on behalf of such company, if made, accepted or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted or indorsed by or on behalf of, or on account of, the company by any person acting under the authority of the company. In the case of private partnerships the firm's name is signed by a partner having authority so to do.

What has just been said as to the mode of signature of or for corporations, companies under the Companies Acts, and firms, assumes that there is capacity to enter into the contract involved in becoming a party to a bill. But it is to be observed that a corporation, though it can contract, is not necessarily thereby entitled to bind itself by becoming party to a bill. Mercantile corporations incorporated by royal charter have power to become parties to bills. Non-mercantile corporations have not, unless expressly authorised by their charter. Companies incorporated by special Act of Parliament have only the powers contained in their Act, unless their business necessarily implies becoming parties to bills. Companies under the Companies Acts may only become parties to bills when such is authorised by their memorandum or articles of association, or where their business necessarily implies the granting of bills. While the signature of a firm by a partner will bind the partners, a partner has only power to bind the firm and his co-partners for what is in the line of the business of the firm. Where, therefore, the granting of bills is outwith the business of the firm, and there is no authority by the other partners to grant them, no one partner is entitled to subscribe the firm's name to bills to the effect of binding his co-partners; *Paterson Brothers* v. *Gladstone*, 1891; 18 R. 403. We have seen that a bill may be accepted by

an agent acting per procuration. Signatures per procuration to bills are common in practice, and effectually bind the principal if the agent in so signing was within the limits of his authority. That authority may be by written mandate or verbal mandate, or it may be inferred from a course of conduct showing that the agent was empowered to act. In order to subject the principal to liability, the signature of the agent must be as procurator for the principal, and from the nature of the signature the other party has notice that the authority is limited. If the signature be the agent's own name only, the principal will not be liable. Where a person signs, adding words indicating that he is signing for a principal or in a representative character, he is not personally liable, but the mere addition of words describing him as an agent or as filling a representative character does not exempt him from personal liability. For example, if the directors of a company were to sign a bill or note designing themselves as "A, B, and C, Directors of the X Co.," they would be personally liable. But if they signed as directors "for behoof of the X Co.," they would not be personally liable. See *Brown* v. *Sutherland*, 17th March, 1875; 2 R. 615; *Alexander* v. *Siger*, L.R. 4 Ex. 102, and the Bills of Exchange Act, 1882, sec. 26, and *MacMeekin* v. *Easton*, 1889; 16 R. 363. In this last case A, B, and C, who signed a promissory note in these terms:—"We, the undersigned, in the name and on the behalf of the Reformed Presbyterian Church, Stranraer, promise to pay," were held personally liable for payment of the note. The whole obligants on a bill are liable conjunctly and severally, though the bill does not contain these words.

**Forgery.**—Where a signature on a bill is a forgery, or where it is unauthorised by the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to the bill can be obtained through it, unless the party whose signature is forged or unauthorised, and who is sought to be made liable, is barred from maintaining that his signature was

forged or unauthorised. The questions concerning forgery which have arisen in question with banks, have almost always turned on the point whether the party alleging forgery had adopted the bill as his. These questions turn mainly on the circumstances of the particular case. The question whether a person has adopted a forged signature is one of fact; but adoption may be inferred as a legal inference from certain facts. It may be said generally, that before a person can be held to have adopted a forged signature he must have known of the forgery, been informed that he was to be held liable upon it, and have so conducted himself as to imply that he acknowledged the liability, or as to allow the other party to be prejudiced. His mere silence on coming to know of the forgery, even though it gives the other party ground for supposing that he acknowledged liability, will not infer adoption, nor will it bar him from repudiating liability unless it has resulted in prejudice to the other party. A recent decision of the House of Lords, *M'Kenzie* v. *British Linen Bank*, 11th February, 1881; 8 R. 8, may be referred to in illustration. John Fraser drew out a bill which he signed as acceptor, and on which he forged the names of Duncan M'Kenzie and another person as drawers. The bill was to come due on 17th July; on 14th July, M'Kenzie received written notice from the British Linen Co. that the bill would be due on 17th July, and lay at their office. He became aware then that the signature was a forgery, and that it had been forged by Fraser who had previously forged his name to another bill. On the 18th July, he was informed by the bank that the bill had been dishonoured and protested for non-payment, and on 21st July the bank again wrote to him about it. It was not till the 29th July after intimation, that proceedings would be taken against him by the bank to recover payment, that he informed the bank of the forgery. No prejudice, however, had occurred to the bank in consequence of his silence from 14th to 29th July. The House of Lords held that the bank had not proved that he had adopted the bill, and further, that he was not barred by his mere silence after knowledge of the forgery

from repudiating liability. It would have been different, however, if M'Kenzie's silence had deprived the bank of some other opportunity of recovering the sum due on the bill. For example, where the person who alleged forgery, remained silent for a considerable time after getting a charge upon the bill, and made no mention of the alleged forgery till the person accused of being the forger had absconded, and it was impossible to do diligence against him, the Court held that the person so acting, made himself liable on the bill.

The Act provides, sec. 60, that when a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority; *Meiklam* v. *Walker*, 1833; 13 Shaw 53, and *Findlay* v. *Currie*, 1850; 13 D. 278.

**Time for Payment and Days of Grace.**—When a bill is not payable on demand, the day on which it is payable is determined thus; three days, called days of grace, are (unless the bill otherwise provides) added to term of payment as fixed by the bill, section 14. The bill is due and payable on the last of these three days. If the last of three days is a Sunday or Christmas day, or Good Friday, on which days no business is done, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is due and payable on the preceding business day. When the last day of grace is a bank holiday other than Christmas day or Good Friday, under the Bank Holidays Act, 1871, and the Holidays Extension Act, 1875, or when the last day of grace is a Sunday, and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.

Bank holidays in Scotland are :—

New Year's Day.
Christmas Day.

If either of these days fall on a Sunday, the next following Monday.

Good Friday.
The first Monday of May.
The first Monday of August.*

The term "month" in a bill means calendar month, sec. 14. Thus a bill drawn at one month after date from 31st January is payable on the expiry of the days of grace running from the 28th, or in leap year from the 29th February.

When a bill is payable at a fixed period after date or after sight, or after the happening of a specified event, the time *of payment* is determined by excluding the day from which the time of payment is to begin to run, and by including the day of payment. Where a bill is payable at a fixed period after sight, the time *begins* to run from the date of acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance or for not delivering it back accepted at the end of the time customary for acceptance.

**Presentment for Payment.**—When the last day of grace has arrived, the bill must be presented for payment. If this be not done the drawer and indorsers are discharged. It must be done by the holder, or some one authorised to receive payment on his behalf, at a reasonable hour on a business day, at the proper place, and to the payer or some person authorised to pay or refuse to pay on his behalf. What "reasonable hours" and "business days" are, has been seen (*supra*, p. 37). The "proper place" is the place specified as the place of payment.

* Bank holidays in England and Ireland are—Easter Monday, the Monday in Whitsun week, the first Monday in August, the 26th December, and whenever the 26th December falls on a Sunday, then the Monday following.

If no place is specified in the bill, the acceptor's address as there given is the proper place. If no address is given in the bill, then it is to be presented at his place of business if known, or, if not, his ordinary residence. In any other case, the place, wherever it is, where the acceptor can be found, or his last known place of business or residence, is the proper place. It may be presented through the post office, where that course is authorised by agreement or usage. Where a bill is presented at the proper place and, after the exercise of reasonable diligence, no one authorised to pay or refuse payment can be found there, no further presentment to the acceptor is required. If there are two acceptors who are not partners, presentment must be made to each of them. Where the acceptor is dead and no place of payment is specified, presentment must be made to his personal representative, if such can be found. There are certain exceptions to the rule, requiring presentment for payment. They are—where the bill has been dishonoured by non-acceptance; where presentment cannot, after the exercise of reasonable diligence, be effected; where presentment has been waived expressly, or by implication; where the drawee is a fictitious person. There is also an exception as regards the drawer's duty to present where the drawee or acceptor is not bound as between himself and the drawer to pay the bill, and the drawer has no reason to believe that it would be paid if presented. See the recent case of *The Bank of Scotland* v. *Lamont & Co.*, 1889; 16 R. 769, where the affairs of a firm being involved, they entered into an agreement with, *inter alios*, their creditors, including the Bank of Scotland and Lamont, who held their acceptance for £700, whereby, on the narrative that the creditors were willing to wait the result of liquidation, the firm conveyed their whole estates to certain attorneys and managers to carry on the business, to ingather the debts, and to make a rateable division of them among the creditors; the attorneys and managers renewed the bill for some time, and then refused to renew it. In an action for payment against Lamont, the drawer, by the Bank of Scotland, with whom he

had discounted the bill, Lamont pleaded that he was discharged from liability in respect of the admitted fact that the bank had not presented the bill to the acceptors for payment. It was held that presentment was not necessary, seeing that by the agreement the acceptors were not bound to pay the bill, and that the drawer had no reason to believe that it would be paid if presented, the acceptors being bound only to make payment, rateably among the creditors, of the funds in hand.

When a bill is duly presented for payment, and payment is refused or cannot be obtained, or when presentment is excused, and the bill is overdue and unpaid, it falls to be treated as dishonoured by non-payment, and an immediate right of recourse accrues to the holder against the drawer and indorsers, on giving them the proper notice.

**Consideration for a Bill.**—The common law of Scotland is that valuable consideration is not required for a bill, and, therefore, that non-onerosity is not a sufficient defence. The common law of England, on the other hand, is that a contract as a bill, like any "simple" contract, requires consideration. The Act of 1882 provides, sec. 27, that valuable consideration for a bill may be any consideration sufficient to support a simple contract or an antecedent debt or liability. This provision does not alter the rule of the common law of Scotland; but it does not follow from that rule that the defence of no value is always irrelevant. For example, a bill may be an accommodation bill—*i.e.*, a bill in which a party has signed as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Now this person is not liable to that person or to any holder of the bill who gave no value for it, but to a holder for value he is liable, whether his position as a mere accommodation party was known to that holder or not. Other instances in which the defence of no value will be effectual against a holder who has given no value for the bill have been thus enumerated,* viz.:—(1) Where there has been no intention to grant an obligation—*e.g.*,

* See Thorburn on Bills of Exchange Act, 1882, p. 76.

where an acceptance has been obtained by force, fear, or fraud; (2) Where a bill has been given under an agreement that it was to be used only on a certain consideration; (3) Where a bill has been given for an immoral or illegal consideration. There is a presumption (sec. 30), that every party whose signature appears on a bill, became a party for value, and where value has been once given for a bill the holder is deemed to be a holder for value, as regards the acceptor and all parties to the bill who became parties prior to value being given. A banker has a lien on bills belonging to his customer which are in his possession. To the extent of the sum for which lies a lien, he is deemed to be a holder for value.

**Transmission of Bills.**—A bill payable to bearer may be passed from hand to hand like a bank note. A bill payable to order requires indorsation as well as delivery. A bill is negotiated (see Bills of Exchange Act, 1882, sec. 31) when it is transferred from one person to another in such a manner as to constitute the transferee the "holder" of the bill, that is, the payee or indorsee who is in possession of the bill. The negotiable nature of the document renders the law jealous of the security of the person who becomes what is called the "holder in due course." A holder in due course is a holder who has taken a bill, complete and regular on the face of it, before it is overdue, without notice of previous dishonour, if any, in good faith, for value, and having no notice at the time of any defect in the title of the person who negotiated it to him. There is a defect in a person's title when he has obtained the bill or the acceptance of it by fraud, duress, or force and fear, or other unlawful means—*e.g.*, theft—or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. The person from whom the holder in due course obtained the bill may have had such a defect in his title, but it will be seen that that will not affect the holder in due course unless he knew of it. Once he has the bill in his possession, valid delivery of the bill by all parties prior to him upon it is conclusively presumed. The acceptor cannot deny

in a question with him the existence of the drawer or the genuineness of the drawer's signature or his capacity and authority to draw the bill. Nor can the drawer deny in a question with him the existence of the payee or his capacity to indorse the bill, nor can the indorser deny in a question with him the genuineness of the signature of the indorser and of prior indorsements. We shall also see that while if a bill has been materially altered, it is as a general rule rendered null, if the alteration be not apparent, the holder in due course may treat it as a good bill and enforce payment of it.

**Indorsation.**—We have seen that where the bill is not payable to bearer the indorsation of the payee or holder is necessary to negotiation or transference as well as the delivery of the bill. If the latter requisite alone had taken place the bill would not be negotiated. But the transferee would obtain the right to have the transferor's indorsement and, meantime, the right which his transferor had in the bill.

An indorsement must, in order to negotiation, be written on the bill, or it may be written on an allonge—*i.e.*, a slip of paper attached to a bill, where there is no room on it for further indorsations. In some countries, but not in the United Kingdom, "copies" of a bill are recognised. If a bill is issued or negotiated in one of these countries, an indorsement may be on a "copy." When made payable to the person named, or to the drawer or his order, the bill is transmitted by the simple indorsation of the payee, or drawer. That is called a blank indorsation. It makes the bill payable to the bearer. It may, however, be special, denominating the party to whom it is indorsed, thus—"Pay to A B or order." The special indorsee must be denominated with reasonable certainty. A bill thus indorsed cannot again be transmitted without the signature of the special indorsee. A holder, however, of a bill with a blank indorsement followed by special indorsements, may cancel the special indorsements, and thus make the bill payable to bearer. With reference to special indorsation it ought to be kept in view that

the indorsee must be named in order to warrant summary diligence. An indorsation thus, "Pay to the Agent of the Bank of Scotland, Glasgow," would not be sufficient to warrant summary diligence at his instance. The agent's name would require to be inserted. *Fraser* v. *Bannerman*, 21st June, 1853; 15 D. 756. A person having a procuration may have the power of indorsing, as well as of accepting or drawing a bill. An indorsement may be "restrictive." By this form of indorsement the indorser gives the indorsee power to receive payment of the bill, and, if necessary, sue any person he would himself have sued for payment of it, but, at the same time, expresses his intention, either, (1) that the indorsee shall not negotiate the bill to any one else, or, (2) that the indorsee is not to become owner of it at all, but only to have authority to deal with it as he, the indorser, directs. Examples of the latter, and of restrictive negotiation, are, "Pay D only," or, "Pay D for account of X," or, "Pay D or order for collection."

An indorsement cannot be partial—*i.e.*, of part of the bill. It must operate upon the bill and all that is due under it, the whole if it is wholly unpaid, or the whole balance if there has been a partial payment. It may be conditional. But in that case the payer of the bill need not pay any attention to the condition, and his payment to the indorsee will be valid whether the condition has been fulfilled or not. Where the holder of a bill payable to his order delivers the bill to a person for value without indorsation, it has been held that the delivery is equivalent to an intimated assignation of the sum in the bill, and that the transferee having given value is entitled to recover payment from the acceptor. *Hood* v. *Stewart*, 1890; 17 R. 749. A bill continues negotiable until it has been discharged or until it has been restrictively indorsed. Thus a bill which is overdue continues to be negotiable, but subject to this important condition, that if it is negotiated after it is overdue, the person who takes it will be subject to any defect of title which affected it at maturity. After maturity no one can acquire or give a better title than that which the person from whom he took it

had. *Prima facie*, every indorsement which is not dated after the maturity of the bill is taken to have been effected before it became due. A bill payable on demand is deemed to be overdue when it appears, on the face of it, to have been in circulation for an unreasonable length of time.

If an indorser wishes to free himself from further liability at the instance of the indorsee, he may do so by adding under his signature the words "without recourse." Sometimes a bill is negotiated back to the drawer himself, or to a prior indorser or to the acceptor. Such a person may re-issue and further negotiate it, but is not entitled to enforce payment of it against any party intervening between his former indorsement and his new indorsement to whom he was previously liable. If a bill which has become due is negotiated back to the acceptor, it is evident that he cannot issue it again, for that discharges the bill.

**Notice of Dishonour.**—Where a bill has been dishonoured by non-acceptance or non-payment, notice of dishonour falls to be given to the drawer and each indorser, and the effect of failure to give such notice to a drawer or indorser is to discharge him from liability. Where, however, a bill is dishonoured by non-acceptance, and notice of dishonour has not been given, the rights of a holder in due course are not prejudiced by the omission, and when notice that a bill has been dishonoured by non-acceptance has been duly given, it is unnecessary to give notice of subsequent dishonour, unless the bill has meantime been accepted. The rules which regulate the notice of dishonour of bills are now contained in sec. 49 of the Act of 1882, and notice of dishonour must, in order to be effectual, be given in accordance with them. It will be proper, therefore, here to quote that section. In the first place, however, it is to be observed that it is to the drawer and indorsers that notice must be given, in order to make these persons liable. Notice of dishonour is not necessary to make liable the acceptor, the proper obligant on the bill.

Section 49 provides, (1) "the notice must be given by or on behalf of the holder, or by or on behalf of an indorser who at the time

of giving it, is himself liable on the bill, (2) notice of dishonour may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not, (3) where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given, (4) where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided [*i.e.*, an indorser who is himself liable at the time of giving notice see (1)], it enures for the benefit of the holder, and all indorsers subsequent to the party to whom notice is given. (5) The notice may be given in writing or by personal communication,* and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment.† (6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour. (7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by personal communication. A mis-description of the bill shall not vitiate the notice unless the party to whom the notice is given is, in fact, misled thereby. (8) When notice of dishonour is required to be given to any person, it may be given either to the party himself or to his agent in that behalf. (9) When the drawer or indorser is dead and the party giving notice knows it, the notice must be given to a personal representative if such there be, and, with the exercise of reasonable diligence, he can be found. (10) Where the drawer or indorser is bankrupt, notice may be given either to the party

* Oral notice of dishonour was admitted under the early law as to bills, but for long prior to the passing of the Act another notice was required. In practice, written notice will, of course, be preferred and is invariable with bankers. It is for the person alleging it to show that it was given.

† There is no precise form of notice, but it should state the date, the sum, and the parties, and should then go on to state that the bill has been dishonoured, and how it has been so, and that recourse is denied. If it has been noted or protested, it is well to state that fact also.

himself or to the trustee. (11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others. (12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. In the absence of special circumstances, notice is not deemed to have been given within a reasonable time unless, (*a*) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill; (*b*) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter.* (13) Where a bill, when dishonoured, is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, on receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder. (14) Where a party to a bill receives due notice of dishonour, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after the dishonour. (15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.† Delay in

* Non-business days are excluded. (See page 37.) If, then, a bill is dishonoured on a Saturday, and the parties reside in the same place, the notice must be sent so as to be delivered on or before the Monday following. If the parties reside in different places, the notice is to be posted before the last post on the Monday.

† It will be observed, that the sender of notice must be able to show that the letter was properly addressed as well as posted. If the address was incorrect or insufficient, he will have to prove that the notice was, in point of fact, delivered. Where the drawer has dated his bill, generally—

giving notice of dishonour is excused (sec. 50), where it is caused by circumstances beyond the control of the person giving it, and not imputable to his fault. For example, his severe illness would be an excuse. But he is bound to give the notice with reasonable diligence as soon as the cause of delay ceases to operate.

A person entitled to notice may waive his right expressly or by implication, or the person whose duty it is to send it, may be unable, after using all reasonable diligence, to find him. In these cases, also, notice of dishonour is dispensed with (sec. 50). It has been seen that the drawer is entitled to notice. Certain exceptions to this rule are, however, admitted (sec. 50 of the Act). The most important of these is the case in which the drawee was not bound as between him and the drawer to accept or pay the bill. In like manner the same section makes certain exceptions to the rule that the indorser is entitled to notice. The most important of these is where the bill was one accepted or made for his accommodation.

A party who has guaranteed payment of a bill is not entitled to notice of dishonour. See the case of *Kirkland* v. *Brown*, 1861; 23 D. 363, but in practice such notice is always given.

**Protest.**—Protest on an inland bill is not necessary in order to preserve recourse; but where summary diligence is to be done a protest is essential in every case. A protest is absolutely necessary to preserve recourse on foreign bills, that is, bills appearing on the face of them to be foreign. If such a bill be dishonoured for non-acceptance it must be protested, and if it be dishonoured for non-payment, not having been previously dishonoured by non-acceptance, it must be protested for non-payment. On the dishonour of an inland bill the general practice is merely to have it noted, which is done by the notary marking the date and his initials upon it, from which the protest may afterwards be compiled when required. By the Act of 1882 where a bill or note is required to be protested

*e.g.*, "Glasgow" or "Edinburgh," and no other full address is known, it would be sufficient to give that address.

within a specified time, it is sufficent that the bill has been noted for protest before the expiration of the time, and the formal protest may be extended at any time thereafter as of the date of the noting. It is important, however, to remember that in order to summary diligence the protest must be recorded within six months from the date of the bill falling due, otherwise this privilege is lost, and an ordinary action before the Court must be resorted to for recovery of the debt. A bill which has been protested for non-acceptance, may also be protested for non-payment. If it is intended to note and protest a bill, it is to be observed that the noting must be on the day of its dishonour. The protest, when subsequently extended, is of the date of the noting, that is, of the dishonour. As the law, however, relating to summary diligence is not affected by the Bills of Exchange Act, 1882, it appears that a bill may still be protested against the acceptor in order to warrant summary diligence at any time within six months of its falling due. Where an error has been made in the date of noting, though the date be corrected in the extended protest, such protest will not warrant summary diligence. *M'Pherson* v. *Wright*, 1885, 12 R. 942. As to the place of protest, it is now fixed (Act of 1882, sec. 51) that the place of protest (which, as we shall see immediately, must be mentioned therein) is to be the place of dishonour, subject only to these exceptions, viz. :—*first*, that where a bill is presented through the post and returned by post dishonoured, it must be protested at the place to which it is returned (on the same day, or if not received in business hours, then the next business day), and *second*, that, where a bill is drawn payable elsewhere than at the payee's place of business or residence and it has been dishonoured by non-acceptance, it must be protested for non-payment at the place at which it is payable, and no further presentment for payment to, or demand on, the drawee is necessary.

The contents of a protest are these (see Act of 1882, sec. 51) :— It must contain a copy of the bill (with the indorsations, if any), and must be signed by the notary who makes it, and must specify the person at whose request the bill is protested, the

place of protest, the date of protest, the cause of protest, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found. It will be observed, with reference to the practice which prevailed prior to the Act, that it has not been made imperative to state that the bill was presented where payable, but that it has been made necessary to state the place at which the protest was taken. The bill does not require to be presented by the notary himself. The presentment may be made by his clerk. The instrument bears that the protest was taken before two witnesses, and despite the common practice the witnesses should be cognizant of the act of Protest. A notary cannot protest a bill in which he himself has an interest, but relationship to the creditor is no objection. On the protest being recorded, an extract is issued containing a warrant to charge the parties on the bill to make payment within six days. If the six days elapse without payment being made poinding may follow. It is no longer competent to imprison on account of non-payment of a bill. If the bill is paid by any of the indorsers after the protest is written out at the instance of another party, diligence will be issued in such indorser's name on the holder giving him a receipt on the protest, bearing that the bill has been paid by him. The receipt must be signed by the holder or a party duly authorised by him, and the party signing must, as before mentioned, state his connection with the holder. *Summers*, 1843; 6 D. 286. After a protest has been recorded, the diligence can only be transmitted by assignation, and no new protest can be recorded as long as the first remains recorded. *Service* v. *Youngman*, 1867; 6 Macph. 172. The expenses of the diligence can only be recovered by an ordinary action, and the creditor is bound to give up the bill on receiving payment of the principal and interest, but he is entitled to retain the diligence to enable him to recover the expenses of an ordinary suit.

The loss or destruction of a bill, or its being wrongly detained from the person entitled to hold it, does not render it impossible for him to obtain a protest upon it. A protest may, in

such a case, be made by the notary on a copy, or on written particulars as to the bill.

Protest is dispensed with by any circumstances which would dispense with notice of dishonour, and delay in noting or protesting, caused by circumstances beyond the control of the holder, and not imputable to his fault, misconduct, or negligence, is excused. He must, however, proceed with reasonable diligence to note and protest the bill whenever the cause of delay is removed.

We have seen that the proper place at which to note and protest a bill is the place of dishonour. It may be, however, that the services of a notary cannot there be procured. The Act of 1882, sec. 94, provides for such a case by enacting that in the event of such a case, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate signed by them, attesting the dishonour of the bill. This certificate is to "operate in all respects as if it were a formal protest of the bill." It is doubtful, however, whether such a certificate would form a warrant for summary diligence. The Act gives a form for these certificates which will be found in the Appendix.

**Discharge of Bill.**—A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. A bill is not discharged when paid by the drawer or indorser, but where a bill payable to or to the order of a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill; and where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill. Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged. When the acceptor of a bill is or becomes the holder of it, at or after its maturity, in his own

right, the bill is discharged. A bill is also discharged when the holder, at or after its maturity, absolutely and unconditionally renounces his rights against the acceptor. Such renunciation must be in writing, unless the bill is delivered up to the acceptor. In like manner the liabilities of any party to a bill may be renounced by the holder before, at, or after its maturity, but this will not affect the rights of a holder in due course without notice of the renunciation.

Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged. In the same way any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent; in such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged. A cancellation made unintentionally or under a mistake or without the authority of the holder, is inoperative, but the burden of proof lies on the party alleging the mistake. See *Dominion Bank* v. *Anderson & Co.*, 1888, 15 R. 408; and *Dominion Bank* v. *Bank of Scotland*, 1889, 16 R. 1081.

Where a bill or acceptance is materially altered without the assent of all parties, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers, provided that where the alteration is not apparent and the bill is in the hands of a holder in due course, he may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. The following alterations are specified by the Act as material:—Any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

**Bill in a Set.**—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. Only one

of the parts need be stamped. A promissory-note cannot be drawn in a set. A holder who indorses two or more parts to different persons, is liable on each, and subsequent indorsers are liable on the part they indorse, as if the parts were separate bills. The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill. The acceptor on paying should require the part bearing his acceptance to be delivered up to him, for if that part is at maturity outstanding in the hands of a holder in due course, he is liable to such holder. Subject to what has already been said, where any one part of a bill drawn in a set is discharged, the whole bill is discharged.

**Prescription of the Bill.**—By the Act 12 Geo. III. c. 72, sec. 37, bills and promissory-notes are declared to be of no force or effect to produce any diligence thereon, unless such diligence shall be raised and executed, or an action commenced, within the space of six years from the date at which the bills become exigible. Bills and promissory-notes, therefore, become extinct in six years, unless the prescription is interrupted by the execution of diligence, or by the raising and execution of an ordinary action. It is not enough that the protest be recorded, but a charge must be given upon the extract within the six years; and, if an ordinary action is resorted to, it must be executed against the debtor within the years of prescription, which begin to run from the last day of grace. After a charge had been given upon a protest, the bill, according to modern writers, is kept in force for forty years.* Prescription may be interrupted

* The soundness of this doctrine has been questioned, on the principles laid down in the old case of *Ferguson* v. *Bethune*, 1811; 16 F.C. 226. The point, however, was not there expressly decided, and the decisions in *M'Indoe* v. *Frame*, 1824; 3 S. 295, and in *Roy* v. *Campbell*, 1850; 12 D. 1028, countenance the doctrine that once the prescription of a bill is interrupted, the debt, in virtue of the decree, will subsist for forty years.

in various other ways; for example, by production of the bill in a trust-deed arrangement, provided the bill be specially mentioned and recognised as a debt in the trust deed, or in a schedule referred to therein. If, however, the bill is not specially mentioned in the trust-deed, the plea of prescription will not be elided (see *Bank of Scotland* v. *Taylor's Trustees*, 1859; 21 D. 1004). Prescription may also be interrupted by production of the bill in a judicial competition, such as a multiplepoinding, or a ranking and sale. In the case of *Blake* v. *Douglas*, 1860, 23 D. 15, an assignation in security was held to be evidence of the subsistence of a debt, even though the bills granted in respect of it had prescribed on the ground that the assignation was in security of the debt, and not of the bill.

Though the bill is extinguished as a document of debt by prescription, yet the debt represented by it is not so; provided the constitution and resting-owing of the debt can be proved by the *writ* or *oath* of the debtor. But the creditor is limited to these two modes of proof, and the bill cannot be referred to as evidence; though reference may be made to it in explanation of the debt. With regard to the writ of the debtor, the rules are, that it must be the writ of the debtor himself (either actually or constructively); that the writing must identify the bill; and that its date must be subsequent to the lapse of the years of prescription, unless it be a writ constituting the debt independently of the bill. A marking on the back of the bill of a payment of interest, or of a sum to account of principal, made in the debtor's own handwriting, after the years of prescription have expired, will suffice to prevent prescription, or a letter acknowledging the debt. As to the identity of the particular bill or debt, see the case of *Taylor's Trustees*, *cited above*, where it was held that a letter by the debtor, acknowledging that he was due to a bank bills to the amount of £3000, was not sufficient to prevent prescription of three of the bills included in that amount.

As to the oath of the debtor, if he admits the constitution of the debt, or that it was incurred by him, and says he does not

remember whether it was paid or not, he will be found liable, as he must swear distinctly that the debt was paid or extinguished; *Paul* v. *Allison*, 1841; 3 D. 874. *Stewart* v. *Robertson*, 1852; 15 D. 12. When the debtor is dead, and the debt referred to his representative's oath, prescription will operate if he swear he is ignorant of the whole matter. An action or diligence raised and executed against one of the obligants on a bill will save prescription as against all the others; *Roy* v. *Campbell*, 1850; 12 D. 1028.

Before closing these observations on bills we may advert shortly to their position in the hands of a banker. They come into his hands either as being discounted by him, or as a security for debt, or as being lodged for collection. On a bill being discounted by a banker, he is held to have purchased it, and he is entitled to look only to the parties whose names are on it for ultimate payment. There is a common impression that a banker is entitled, on the failure of the obligants, to follow goods for the price of which the bill was granted, if these goods have not reached the acceptor, or are in the hands of a consignee for sale, and to claim that the price of the goods shall be applied in payment of the bill. But this is an erroneous view. No doubt goods in the hands of a consignee may be made available as a security for a discounted bill; but certain steps must be taken for having that security constituted, by obtaining a delivery-order from the owner of the goods, and intimating it to the consignee, whereupon the latter will hold the goods to the banker's own order.

At the same time, circumstances may arise in which a banker may have an indirect claim upon goods against which he has discounted a bill, though he has taken no special security over them. Suppose a case which occurs very often in practice:—A consigns goods to B for sale, and draws a bill upon him for the estimated value, which is discounted with a banker. Both A and B fail during the currency of the bill, and while the goods are unsold. B's trustee is entitled to retain the goods until relieved of the acceptance, and also, unless the goods are

specially appropriated, until payment of any general balance due to him. If there is no general balance due to B, or if the goods are not specially appropriated, the holder of the bill is entitled to have the goods applied in payment of the bill.

Bills granted or indorsed to a bank in security of a *special* debt are useful for constituting the debt, and afford a ready means for recovery from any co-obligants on the bill. A bill is sometimes made the foundation of a cash-credit; but this seems very objectionable, as the nature and object of a bill are not such as to admit of continuous operations against it. The cash-account bond was called into existence to meet such cases; and *it seems a misapplication of a bill to use it for the purposes of a cash-credit bond.* It is a fixed principle in law that sums paid to the credit of a bond for a specific sum cannot be drawn out again, and that the bond is discharged to the extent of the sums paid. The same principle would appear applicable to a bill, and it would follow, therefore, that a bank's claim against co-obligants on a bill given as a security for a current-account would be discharged to the extent of all sums paid in, even though drawn out again. Where there are no co-obligants on a bill which has been made the foundation of an operative-account, it is of no practical benefit in the recovery of the debt, as the cheques of the operator would form the vouchers of the claim in any suit against him. The difficulty above alluded to, as regards co-obligants, may be got over in this way—by discounting the bill and handing the proceeds to the parties. They may then pay in the proceeds to the credit of a deposit-account in the name of the person who is to make the operations; the same rate of interest being allowed by the bank on sums at the credit of the deposit-account as is charged upon the bill. If the bill be not retired at maturity the bank has a lien over any sum at the credit of the deposit-account, and may appropriate it towards payment of the bill.

With regard to bills lodged with a bank for collection, it seems enough to say that the bank is bound duly to negotiate them, and that it is liable for the contents to the party lodging

the bills if any miscarriage take place in the negotiation. If a bill is made payable by the acceptor at his banker's, such acceptance is held a sufficient authority to the banker to apply any funds of the acceptor's in his hand in payment of the bill, or to debit the acceptor's account with it.

Bills lodged in security of a debt, or general balance, will be considered under the head of Banker's Lien.

## CHAPTER IV.

### DOCUMENT BILLS AND CREDITS, ETC.

Document Bills are so designated because they are drawn by foreign merchants against produce shipped by them for constituents; and because the drawers, for their own security, have attached to the bills, the shipping documents for the produce against which they have been drawn. There is no peculiarity about the form of this class of bills, except that they usually specify at the close, that value has been received in the merchandise against which they are drawn, and for which the shipping documents are attached. These documents being attached, constitute what may be termed a title of conventional ownership to the merchandise, as they invest the drawers and *bona fide* holders of the bill with an absolute collateral security over such merchandise until the bill is taken up. The shipping documents give the holder of the bill a right to warehouse the merchandise on the ship's arrival; to protect it by insurance; and, if necessary, to sell it in satisfaction of the sum due, should the bill not be paid at maturity. Of course, the holder of the document, if he takes delivery of the goods, is subject to the same liabilities for freight and charges as the acceptor for whose account the goods may have been shipped. The shipping documents usually consist of—(1) a bill of lading, which, as explained in a subsequent chapter, is transferable by indorsation; (2) a policy of insurance against the perils of the sea; and (3) a letter of hypothecation under the hand of the drawers, bearing reference to the shipment and the bill drawn against it, and stating that the bill of lading and policy are to be held in security of the sum in the bill, with a power of sale in the event of the bill not being retired. To meet the contingency of the drawee

failing to accept, this letter also authorises the holder, or representative of the drawer, to warehouse the goods at the expense of the latter, and to perform all other acts implied in a right of ownership. Authority is also given to draw on the granter for any deficiency, and on the other hand, the holder is taken bound to account to the drawer for any surplus. It frequently happens that, by arrangement, the goods are to be insured in this country, and not in the country where they are shipped; and when such is the case, the letter bears that the drawee is to insure and deliver up the policy, authority being given for insurance to be effected on the drawer's own account, should the drawee fail to take out a policy.* If the merchandise be lost at sea, the holder of the bill and documents is, of course, in right to recover from the underwriters the sum insured.

As the exigencies of commerce require that document bills should be at the call of the acceptor, it is quite settled in practice, and is usually stipulated in the letter of hypothecation, that the acceptor is entitled at any time during their currency to take them up, under discount, at the *minimum rate of the Bank of England*: and in some states of the money market this circumstance requires to be kept in view by parties discounting.

Owing to the extension of commerce, document bills have greatly increased in number in recent years, and where the drawers and acceptors are people of reputation and character, and the produce against which the bills are drawn is a staple article, bearing a solid and not a fictitious or temporarily inflated value, the security afforded to discounters is justly regarded as one of a satisfactory and trustworthy character.

The documents constituting the security are simple and easily understood; but, of course, the banker must satisfy himself of the *bona fide* character of the transaction by looking well to the

* A policy made abroad, but enforceable within the United Kingdom, must be stamped within two months of its arrival in this country, in order to give it validity. Policies made in this country must be stamped before execution.

names of the drawer and acceptor, not forgetting to exercise the same care in regard to the policy of insurance.

**Credits.**—The documents, termed in mercantile phraseology Credits, are letters binding the granter to accept the drafts of the grantee for a certain specified sum, at a particular usance; and, when framed in these terms, they are called "clean credits," as indicating that they are not encumbered with conditions of any kind, either in regard to the description of shipments against which the drafts under them are to be passed, or in regard to delivery of shipping documents to the granter at the time of acceptance, or otherwise. But, of course, their terms may be varied and made to suit exactly what the parties to the particular transaction agree upon. They are, for the most part, issued by bankers or wealthy mercantile firms, and the purposes for which they are issued are, commonly, either—(1) to pledge the credit of the granter (who charges a commission for the facility) on behalf of another, frequently not appearing at all on the face of the transaction, in order to enable that other to make purchases, or to get orders executed, which would be impracticable on the credit of himself alone; or (2) as a means of laying down funds in foreign countries on account of the granters themselves, there to be employed or invested on account of such granters, or used for the purpose of carrying on exchange operations.

The first-mentioned class of credits are usually placed with merchants abroad, and are accompanied by orders for produce, and the merchants may either send home the bills they draw as remittances on their own account, or they may sell them to another in the country where they are drawn, transferring at the same time the credit to the purchaser. In this latter case, the rights of the original drawer are acquired by the purchaser, and he or his representatives present the bill for acceptance, the drawer himself being also liable to the purchaser by virtue of his indorsation. Where credits are granted by banks of undoubted stability, or by wealthy capitalists, shipping docu-

ments are of minor importance to the purchasers or discounters of such bills, and the credits in question frequently stipulate that documents are to be delivered on acceptance. In other cases, however, documents are often attached to credit bills, and remain so attached till the bills are paid up; matters in this respect being regulated very much by the weight attachable to the signature of the party granting the credits.

The credits issued by bankers or capitalists for the purpose of laying down funds in foreign countries are usually lithographed in sets of specified amounts on the same pieces of paper on which the bills of exchange to be drawn under them are lithographed; and, for this reason, they are styled marginal credits. When sold abroad, the purchaser gets delivery of the credits along with the bills; and, when accepted, the acceptors remove their credits, as having been purified by acceptance, and the holder then relies exclusively on the bills.

## CHAPTER V.

### BANKER'S DRAFT OR CHEQUE, BANK NOTES, AND I.O.U.'S.

**Bank Draft or Cheque.**—The Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, Part iii. (secs. 73 to 82), deals with and codifies the law relating to Bank Cheques.

**Definition.**—Sec. 73 defines a cheque as a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand, apply to a cheque. A cheque may be made payable either to bearer or to order. The words "on demand" are not essential. It ought to be in the shape of a direct order by the drawer on the drawee, and not in the shape of a precatory request. It is liable to a stamp-duty of one penny (Stamp Act, 33 & 34 Vict. c. 97, secs. 50 and 54). A cheque must be dated and contain distinctly the amount to be paid; there is no restriction or limit to the amount of cheques, and a cheque dated on Sunday is not invalid on that account. Cheques post-dated are not illegal, but they cannot be paid by the drawee until the day of the date arrives.

The restriction as to post-dating cheques was contained in the Act 55 Geo. III. c. 184, sec. 13; but that has been repealed, and since the repeal it would appear that post-dated cheques are admissible in evidence; *Gatty* v. *Fry*, 2 L.R., Ex. Div. 265. But they are anomalous; they bear falsehood on their face, and no prudent banker would have anything to do with them.

A cheque must be drawn in British money—that is to say, a cheque drawn for so many dollars or rupees, or such like, would be illegal. The stamp duty on cheques may be paid either by

an impressed stamp or by an adhesive stamp. In the latter case, the stamp should be cancelled by the granter initialing or signing across the stamp and adding the date. Any person issuing, negotiating, or paying a cheque unstamped, is liable to a penalty of ten pounds; and if a cheque unstamped is presented to a banker, it is competent for him to stamp the cheque and to charge the drawer's account with the stamp. But this act of the banker will not relieve the drawer or negotiator of the cheque from the statutory penalty. Cheques payable to order, if purporting to be indorsed by the original payee, may be charged by the banker upon whom they are drawn to the drawer's account, even although the indorsation of such payee has been forged, 16 & 17 Vict. c. 59, sec. 19.

Bank cheques are negotiable, and indorsation imposes liability on the endorser to the endorsee, provided such cheque was duly negotiated according to the custom observed in bills of exchange; *M'Donald* v. *Union Bank*, 1864; 2 Macph. 963. Cheques, if payable to bearer, may be transferred from hand to hand without indorsation, but cheques made payable to "myself or order" or to "A or order," require the indorsement of the payee. If a cheque payable to bearer, or an indorsed cheque payable to order, come into the possession of a holder for value, who is ignorant of the transferror's want of title, the drawer is liable in an action on the cheque. It is otherwise in the case of a forged indorsation; in that case the holder can never be a lawful holder, however great his *bona fides*; *Bobbet* v. *Pinkett*, L.R., 1 Ex. D. 368.

If the sum in the cheque be fraudulently altered, and a larger amount paid by the banker than the sum originally filled in by the drawer, the loss will fall upon the banker, unless the negligence of the customer has facilitated the fraud.

**Presentment of Cheque for Payment.**—Sec. 74 of the Act provides that, subject to the provisions of the Act—(1) Where a cheque is not presented within a reasonable time of its issue,

and the drawer or the person on whose account it is drawn, had the right at the time of such presentment as between him and the banker to have the cheque paid, and suffered actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been, had such cheque been paid. (2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. (3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge and entitled to recover the amount from him.

The general rule is, that the holder of a cheque must present it for payment not later than the day after he receives it. If, however, the bank on which it is drawn be at a distance, the holder is allowed the day after he receives it to transmit it by post. If the cheque be crossed, the holder must lodge it with his banker in time to be presented on the following day, or if the place of presentment be at a distance, in time to be despatched in course of post. A holder of a cheque is not entitled to enlarge the time of presentment by putting it into the hands of a banker or agent for negotiation. If the cheque is not duly presented in conformity with the above rules, the party who indorses it to the holder will be discharged from all liability. As a cheque is never overdue, the drawer will not be discharged of his liability on account of its not being duly presented unless he suffers loss by the delay; but if the holder of the cheque retains it in his possession beyond the proper time for presentment, and the banker on whom the cheque is drawn becomes bankrupt before payment is obtained, the drawer is discharged from liability. Bankers receiving from their customers cheques drawn on other parties, are bound to have them presented in conformity with the above rules; otherwise, if the cheque is dishonoured, the loss may fall upon

themselves. There are some very instructive decisions on this subject, the general tenor of which seems to be that the day after the receipt of the cheque is the last day allowed by the law for legal presentation, so as to preserve recourse against prior indorsers in the event of its dishonour.

It is commonly supposed that the London County Clearing-House is a proper channel for negotiating English or Irish provincial cheques having a reference (in the corner) to the London agents of the drawee; and the English case of *Hare* v. *Henty*, 30 L.J., C.P., 302, is cited in support of such an opinion. But a careful perusal of that case will show that the point decided was merely, that in that particular case the cheque in question was negotiated within *due time*. And hence bankers negotiating cheques through the London County Clearing-House should get a distinct admission, in writing, that such negotiation is at the risk of their customers.

A banker is bound to pay a cheque when presented, if the drawer has sufficient funds in the banker's hands to meet it, and if the latter declines, he is liable in damages to the drawer for injury to his credit. A banker, however, is not bound to pay if he hold overdue bills of his customer, as he is entitled to apply the funds in payment of these. It is also a sufficient ground of refusal if the banker has, before presentation of the cheque, applied the customer's funds in payment of his acceptances made payable at the banker's, that form of acceptance being a sufficient authority to the banker to retain the bills. In the case of *Ireland* v. *The North of Scotland Banking Co.*, 1880; 8 R. 215, it was held that the bank was not entitled to withhold payment of a cheque for £100 drawn on the account of an executry estate, for which they held £413 on account current, on the ground that the estate was insolvent, and that the bank, which had a claim for £130, intended to apply for sequestration of it. While some consideration is due to the customer and in courtesy almost invariably extended, the mere fact that the bank has on former occasions allowed the customer to overdraw his account, does not in any way operate

so as to bar the money-lender from stopping his advances, whenever he shall deem it expedient to do so; *Ritchie* v. *Clydesdale Bank*, 1886; 13 R. 866. When a cheque is presented to a banker, and the banker has not sufficient funds to answer the demand, the proper reply to give to the presenter is "insufficient funds," and should the holder of the cheque inquire how much stands at the drawer's credit with a view to paying in the difference, and so getting payment of the cheque, such payment, it is understood, would be reducible, as being in prejudice of the other creditors of the maker of the cheque. It follows, accordingly, that in such cases a bank is not bound to pay a cheque in part. A cheque, however, when presented for payment operates as an intimated assignation of any funds of the drawer in the hands of the bank up to the amount of the cheque, and this although the bank is only indebted to the granter to a less amount than that contained in the cheque; *British Linen Co. Bank* v. *Carruthers & Fergusson*, 1883; 10 R. 923. This case was decided at common law, but in Scotland the law is unchanged by the Bills of Exchange Act, see secs. 53 and 73.

**Dishonoured Cheques.**—In case of dishonour, the provisions of the law as to bills payable on demand apply to cheques, except that they cannot be protested for summary diligence, the Act of 1882 leaving the law and practice in this respect unaltered. A protest taken will, of course, afford conclusive evidence of the presentation of the cheque, and in this respect will be useful.

**Revocation of Banker's Authority.**—Sec. 75 provides that the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—(1) Countermand of payment; (2) Notice of the customer's death. The death of the drawer of a cheque does not amount to a countermand of it, if it was given to the payee in payment of a debt, or as a donation; but if the death of the drawer be known to the

banker, he will be justified in refusing to pay the cheque until he has ascertained whether the holder is entitled to demand payment; *Bryce* v. *Young's Executors*, 1866; 4 Macph. 312. As regards the right of the drawer to stop payment of a cheque, it seems settled that such stoppage in no way affects the right of a holder for value; but the banker is not bound to pay where the drawer has stopped payment of the cheque. See *Waterston* v. *City of Glasgow Bank*, 1874; 1 R. 470. Indeed, it has been held in England that a London banker who accepted cheques in payment of certain bills sent by a country correspondent for collection, was not guilty of negligence in taking the cheques as payment of the bills, though the former were afterwards dishonoured.

**Crossed Cheques.**—The practice of crossing cheques with the name of the banker by whom they were presented for payment arose in the end of last century, and gradually developed into a practice of crossing cheques with the words "and Company," or "& Co.," generally between two parallel lines, and sometimes of merely drawing two parallel lines across the cheque. Bankers paid attention to these crossings, and generally refused payment of cheques so crossed, unless presented to them through a banker. The object of the practice was to interpose difficulties in the way of a thief or unlawful holder cashing stolen cheques, and also to afford facilities for tracing the person by whom a cheque was presented. The effect in law of crossing a cheque remained doubtful down to 1852, after which a series of decisions showed that the protection given by crossing was much less than had been supposed. The Legislature then dealt with the subject in the Act 39 & 40 Vict. c. 81, now repealed by the Bills of Exchange Act, secs. 76 to 82 of which supersede the former Act. This Act recognises the following ways of crossing a cheque. (1) Where a cheque bears across its face an addition of (*a*) the words "and Company," or any abbreviation thereof, between two parallel transverse lines, either with or without the words "not negotiable," or (*b*) two parallel transverse lines

simply, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed generally. (2) When a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker. A cheque may be crossed generally or specially by the drawer. Where a cheque is uncrossed, the holder may cross it generally or specially. Where a cheque is crossed generally, the holder may cross it specially. Where a cheque is crossed generally or specially, the holder may add the words "not negotiable." Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection. Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself. A crossing authorised by this Act is a material part of the cheque, and it is not lawful for any person to obliterate, or, except as authorised by the Act, to add to or alter the crossing. Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn must refuse payment thereof. Where the banker on whom a cheque is drawn which is so crossed, nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Provided that where a cheque is presented for payment, which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by the Act, the banker paying the cheque in good faith and without negligence is not responsible nor incurs any liability; nor can the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as

authorised by the Act, and of payment having been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be. When a banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, are respectively entitled to the same rights, and are placed in the same position as if payment of the cheque had been made to the true owner thereof. Where a person takes a crossed cheque which bears on it the words "not negotiable," he has not and is not capable of giving a better title to the cheque than that which the person from whom he took it had. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker does not incur any liability to the true owner of the cheque by reason only of having received each payment.

It will be noticed that under these sections either the drawer or the holder may cross a cheque; in the case of a cheque made payable to A or order, no one except A, or some one to whom he has indorsed it, can ever become the holder; no one can hold on a forged indorsation. On the other hand, if the cheque be made payable to bearer, either by the drawer or by the indorser, whoever has possession, although he may have obtained it illegally, is the holder of the cheque, and may cross it as authorised by the Act. Nothing in the Act affects the negotiability of crossed cheques, unless they are marked "not negotiable," and a holder of a crossed cheque for value, although he hold it from a thief or finder, may use the cheque as an assignation for the amount, and sue the banker for payment, should he refuse it. A banker who in any way disregards the crossings on a cheque forfeits the protection given to him by sec. 60, in the case of his having

in good faith paid a cheque, the indorsement on which has been forged.

**Letter of Credit.**—A letter of credit was at one time an instrument much used by bankers for transmitting money to a distance. It is now virtually superseded by a draft payable to order or demand, a document which we shall immediately notice. The letter of credit is an authority by one banker addressed to another, requesting him to honour the drafts of the person named to the extent of the sum mentioned in the letter. It requires to be stamped with a penny stamp. Circular notes, or general letters of credit addressed to all the correspondents of a bank, requesting them to cash drafts for a fixed amount drawn by the person named in the note on the bank or its London correspondent, are in daily use. According to the law of England these documents are not negotiable, and so payment must be made to the person named in the letter, or to his agent duly authorised to receive it. The question whether letters of credit could or could not be transferred by indorsation came before the Court of Session in the case of *Struthers* v. *Commercial Bank of Scotland*, 1842; 4 D. 460. Considerable difference of opinion prevailed among the judges on the subject, and the majority held that a letter of credit was not transferable by indorsation so as to entitle the indorsee to draw the money in his own right; but that the payee, in putting his name on the back of the letter, gave an irrevocable mandate to the Commercial Bank of Scotland, who had cashed the letter of credit, which entitled them to the sum contained in it, notwithstanding the intervening bankruptcy of the payee. In the same way, when the holder of a circular note puts his name on the back of the note, he authorises the banker cashing it to fill up the blank draft which is indorsed upon it with his own name as payee.

**Draft Payable to Order or Demand.**—This document has,

as we have said, virtually taken the place of the old letter of credit. The form of the draft is as under :—

"*Bank of Scotland,*
*Edinburgh, 1st January,* 1875.

"*To* Messrs. Smith, Payne, & Smith, London.

"On demand, pay to A B, or order, One Hundred Pounds, charging the same in account with the Bank of Scotland."

This document is purposely framed so as to bring it under a clause in the 16 & 17 Vict. c. 59, sec. 19, by which bankers are protected from being called upon to pay a second claim, although the signature of the payee named in the draft be forged; and this protection, it may be observed, passes to the signature per procuration of the payee. In order to throw the risk of forgery upon the banker, a *bill* would require to be purchased from him, drawn on his correspondent in the town to which the money is to be transmitted. This adds the cost of the bill stamp to the expense of the remittance, but the additional expense is fully met to the purchaser by his being made sure either that the money cannot be paid except on the genuine indorsement of the payee, or that a banker paying on a forgery will be liable in second payment to the purchaser of the bill.

**Bank Notes.**—Bank notes are promissory-notes payable to the bearer on demand, and pass from hand to hand by delivery. In England, bank notes under £5 are illegal. In Scotland, bank notes must be for one pound or some whole number of pounds; but although £2 notes and guinea notes were at one time issued in Scotland, the practice has been discontinued, and the notes issued in Scotland consist now only of £100, £20, £10, £5, and £1. Bank of England notes are a legal tender in England, except as regards that Bank and its branches. The Bank of England notes are not a legal tender in Scotland, nor are the notes of the Scotch Banks. The receiver of these takes them at his peril, unless he keeps alive his right of relief

by presentation and negotiation in the same way as in the case of bills of exchange. Silver is a legal tender to the amount of forty shillings only, and bronze to the amount of one shilling, but no more. The issue of bank notes in Scotland is regulated by 8 & 9 Vict. c. 38, and 17 & 18 Vict. c. 83. The last-mentioned Act contains a statutory definition of bank notes.

If the sum named in a bank note be fraudulently altered to a larger sum, as from 10 to 20, the note, as such, is destroyed; but the bank will nevertheless be liable to pay the sum which the genuine note originally represented to an onerous holder. The principle on which the bank's liability continues is, that although the voucher of a debt is destroyed, the debt itself subsists, and is recoverable by an ordinary action, in which the creditor will be allowed to prove the existence of the debt by competent legal evidence.

**I.O.U.'s.**—The validity of these objectionable documents has been sustained by law; but no prudent banker should have anything to do with them. It may be mentioned as a matter of information, that an I.O.U. proper should contain date, the three letters I.O.U., the sum, the debtor's signature, and the creditor's name and address, and must be holograph of the granter; *Haldane* v. *Speirs*, 7th March, 1872; 10 Macph. 541. It is not negotiable. An I.O.U. is a mere acknowledgment of debt, as distinguished from a bond or obligatory instrument, and the holder must sue on the debt, not on the acknowledgment, which is only evidence of the granter's indebtedness at its date; *Neilson's Trustees*, 1883; 11 R. 119.

## CHAPTER VI.

### DEPOSIT-RECEIPT, MANDATE, AND PROCURATION.

**Deposit-Receipts.**—A deposit-receipt is a voucher given by bankers to their customers for sums lodged otherwise than on current account. These receipts, as issued by the Scotch banks, are invariably payable on demand, and bear interest from their date, although they contain no clause to this effect. It was long a matter of doubt as to whether a deposit-receipt was a negotiable document and transmissible by indorsation, and this question has over and over again exercised the judges of the Court of Session. The result of several decisions seems to be this, that the indorsation of a deposit-receipt is a mere mandate to uplift the money from the bank for behoof of the granter. It confers no right of property in the money, and the party uplifting it is bound to account for it to the owner of the receipt. Hence it follows that by the death of the granter, a party in possession of a deposit-receipt gratuitously indorsed has no power to uplift the money from the bank after the death of the owner of the receipt, and that the bank would not be in safety to pay it if the owner's death were known or intimated to them.

Questions have frequently arisen whether deposit-receipts indorsed by the holder, and found in possession of a third party after the holder's death, inferred a donation of the contents. See the following instructive cases:—*British Linen Company* v. *Mackenzie*, 1866; 4 Macph. 820; *Ross* v. *Mellis*, 1871; 10 Macph. 197; and *Sharp* v. *Paton*, 1883; 10 R. 1000. In the last-mentioned case Lord President Inglis said, "There is a strong presumption against donation in such a case, and it requires very strong and unimpeachable evidence to overcome it."

**Receipts to be drawn by either of two Parties.**—It is common for bankers to issue deposit-receipts in favour of two persons to be drawn by either. So far as the bank is concerned, it seems pretty clear that in such a receipt it will be held that the money belonged to both parties in equal halves; but bankers are in the habit of paying such receipt on the indorsation of either of the parties without making any inquiry as to the disposal of the money, acting on the doctrine that by the terms of the receipt there is an expressed mandate, so long as both parties are alive, that the money should be uplifted by either. The rule of the law being, as we have seen, that gratuitous mandates fall by death, it follows that if the bank know of the death of one of the granters, they cannot in safety pay the contents of the deposit-receipt to the survivor without the consent of the legal representatives of the deceased. If, however, the bank, in ignorance of such death, pay the amount entered in the receipt, they are not liable. In such cases the legal representatives are the executors confirmed by the Sheriff. To avoid the questions which have arisen with reference to receipts payable to either of two parties, the words "or the survivor" should be inserted; and it seems to be pretty well understood that, *as regards the bank*, the contents of a deposit-receipt may be safely paid to the survivor. But as the property of the money is not determined by the words of the receipt, the proper course is for the banker to get the consent of all parties interested. It should be kept steadily in view, that the mere terms of a deposit-receipt do not necessarily fix the ownership of the money; thus a deposit-receipt taken by A in name of himself and B to be drawn by them, or either, or survivor, will on A's death, go to the executor, unless B can bring sufficient corroborative evidence of donation; *Crosbie's Trustees*, 1880; 7 R. 823; *Macdonald*, 1889; 16 R. 758.

The effect of the indorsation of a deposit-receipt for an onerous consideration, seems much the same as an onerous indorsation of a bank cheque or bill of exchange.

A deposit-receipt in possession of a bank, indorsed by the party in whose favour it was granted, is, according to a well-

known rule of law, presumptive of payment. The indorsation may be treated by the bank either as a draft or a discharge for the sum in the receipt, and either of these they would be entitled to write above the indorsation if necessary.

Receipts issued to a married woman formerly fell under the *jus mariti*, and a husband might demand payment on his own indorsation, but now under the Married Women's Property (Scotland) Act, 1881, the moveable estate of the wife is excluded from the *jus mariti* of the husband, and the income of such estate is payable to the wife on her individual receipt. (See chap. I. "Married Women.")

It may be proper to notice here the effect of the indorsation of a deposit-receipt by a X made before witnesses by a party who cannot write. The general rule of law is that all deeds, where the granter is incapable of writing, must be executed by a notary, or a justice of the peace, before two witnesses; but in order to facilitate business, this method of discharging a deposit-receipt is usually dispensed with by bankers, and the practice is to pay on the grantee indorsing the receipt with his or her mark before witnesses. See *Forbes' Executors* v. *Western Bank*, 1854; 16 D. 807.

**Receipts for Judicial and other Consignments.**—Judicial consignments are generally payable to the party preferred to the fund by decree of the Court. The only observation requiring to be made as to the payment of such receipts is to see that the interlocutor contains a distinct warrant on the bank to make payment to the party named. Bankers sometimes pay such consignments on a certified copy of the interlocutor, but this course is very objectionable, as a reclaiming note, or an appeal to the Sheriff, may, without the banker's knowledge, be lodged against the interlocutor, and the latter might be reversed. The safe course, therefore, is to pay on an official extract of the decree, of which the bank generally gets delivery, or on a certified copy of the interlocutor, containing an order on the banker to pay. If the decree contain other matter, the bank usually gets an official abstract of the extract.

It may be here noted that, under the Pupils' Protection Act, 12 & 13 Vict. c. 51, sec. 37, the interest on judicial consignments, or on consignments by judicial factors, tutors, or curators, must be accumulated with the principal at least once a year by the bank.

Under the Titles to Land Consolidation Act, 1868, the creditor is directed to consign the surplus of the price which may remain after paying the heritable debt and expenses, and prior incumbrances, in any of the banks in Scotland incorporated by Act of Parliament or Royal Charter, or their branches, in the joint names of the seller and purchaser, for behoof of the party or parties having best right thereto. These consignments may be paid on the receipt of the seller and the purchaser, and of the party to whom the property sold belonged, or those in right of the surplus. In the event of any difficulty or dispute arising as between them, the proper course for the bank to follow is to have the matter determined in Court by a multiplepoinding. In like manner, the redemption-money of a bond or disposition of security may be consigned in bank by the debtor to be made forthcoming on the part of the consigner to the creditor in the bond, or those in his right. The receipt may be paid on the discharge of a creditor, or those in his right, with the consent of the consigner. (See Appendix for forms of these documents.)

**Mandates.**—A mandate is an authority by one party empowering another to exercise a right, or rights, in his room. If the business to be transacted be of value and importance, the authority under which it is managed is called a factory or commission, or a power of attorney. These deeds, though executed with the legal solemnities, are, properly speaking, of the nature of a mandate. Mandates are generally used in connection with mercantile transactions, and are, therefore, privileged by law. They are simple in their form, and do not require to be tested.

Mandates are either general or special in their character. General mandates are usually in the form of a factory and com-

mission, and confer general powers of management only, such as the collection of rents, interest dividends, and outstanding debts, and such acts of administration as are clearly within the scope of the employment. A factor or mandatory, therefore, acting under a general authority merely, has no power to do any extraordinary act so as to bind the principal or mandant. He cannot, for example, sell his constituent's heritages or moveables of value, such as the stock of a bank or other public body. He cannot borrow money in name of his constituent; nor, as we shall afterwards see, can he pass cheques upon his constituent's bank-account, or uplift his money from bank. If it is wished to confer power upon a factor to do all or any of these things, his factory must contain special powers to that effect.

A special mandate limits the mandatory's power to the particular thing or things which he is authorised to do. They are rigidly interpreted; so that parties dealing with mandatories require to be on their guard to see that the powers exercised by the mandatory are contained in his authority. A mandate authorising a party to operate on a cash or current-account, only authorises operations within the sum at credit, so that the principal is not liable for over-drafts, unless he has actually received the money. Parties dealing with factors, mandatories, or procurators, are held to have perused the authorities under which they act, and to be aware of the extent of their power.

A mandate is a personal authority. A factor or mandatory cannot therefore delegate his powers to another. Mandates fall by the death or bankruptcy of either the mandant or mandatory. If, however, the matter authorised in the mandate be entered upon but not concluded, the mandate does not necessarily fall by the death of either party, and may be concluded, in cases of urgency at least, by the mandatory himself in the one case, or his heir in the other. Also, where the mandatory acts in ignorance of the death of the mandant, his actings under the authority of the mandate bind the mandant's heir. Mandates may be recalled by written intimation to the parties with whom the mandatory transacted or was entitled to transact. They

may also in certain cases be recalled by implication, as, for example, by the appointment of another mandatory, or by the need of a mandatory ceasing to exist; when granted, for instance, on the narrative of the principal's intention to go abroad, and appointing the mandatory to act in his absence; on the return of the granter to the country, the mandatory's power ceases, and parties in the knowledge of the granter's return are not safe in dealing with the mandatory. Again, where a mandate is given to act during the granter's indisposition, his restoration to health amounts to a recall of the mandate in a question with a party who was aware of that fact.

**Procuration.**—A procuration to sign bills and cheques may be constituted by writing; or it may be implied from a course of dealing between the principal and agent, or from facts and circumstances showing that the principal had recognised and adopted bills or cheques drawn by a procurator who had no written authority. Secs. 25 and 26 of the Bills of Exchange Act, 1882, refer to procuration as follows; sec. 25—A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority; sec. 26—(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon, but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

There is no special form for a written procuration. It may be validly constituted by a simple letter authorising the party named to sign the bills and cheques of the granter *per* procura-

tion.* It is desirable, where bills are offered for discount, drawn or accepted by a procurator, that the banker should see that the procurator has a written authority to act, as this may save difficult questions in the event of a dispute with the principal.

Procuration may be implied in certain cases where the procurator has no written authority; but the holder of a bill so drawn or accepted, in any question with the principal, must be prepared to aver and prove specific instances where the principal had previously adopted or recognised similar acts of the procurator. It is not enough to say that the procurator was the agent or clerk of the principal, and that he was generally reported or understood to have power to sign *per* procuration. This is well illustrated by the case of *Swinburne* v. *The Western Bank*, 1856; 18 D. 1025. The bank charged Swinburne to pay a bill drawn and indorsed by A. W. Galloway, *per* procuration of Swinburne. Swinburne suspended the charge, on the ground that Galloway had no power to sign bills *per* procuration. The bank, in answer, averred that Galloway was the admitted and known agent of Swinburne; that he had discounted numerous bills so drawn and indorsed; and averred, generally, that Swinburne knew of all this. They failed, however, to specify particular instances where such bills had been recognised or adopted by Swinburne, and the Court held their averments irrelevant, and declined to send the case to a jury. In the case of *Sinclair, Moorhead & Co.* v. *Wallace & Co.*, 1880; 7 R. 874, an agent with full power to carry on the business of his principals in another town, and with a written authority to sign receipts, bills, cheques, &c., *per* procuration of his principals, borrowed money on the representation to the lender that it was for use in his principal's business and granted the lender a bill of exchange, blank in the drawer's name, but signed by him *per* procuration of his principals, for the amount. He used the money ultimately in reducing a deficit in his principal's bank account caused by his malversations. The agent absconded,

* But such letter must be stamped with a duty of 10s.

leaving heavy defalcations. The holder of the bill having charged the principals upon it, in a suspension of the charge, it was held that, in the absence of express power to borrow, the agent was not entitled to do so, and that, even assuming the money to have been applied for the benefit of the principals, that did not make them liable.

**Implied Mandate.**—The principles laid down by the above decision are generally applicable to cases of all implied mandates, and show that great caution should be exercised in dealing with a mandatory who has no written authority from the principal. Two cases of implied mandate may be here adverted to as affecting bankers. The first is that of *Forbes' Ex.* v. *The Western Bank*, 1854; 16 D. 807. Here a party lodged £400 on deposit-receipt. She intrusted the receipt to C. Walker, her law-agent. Sometime afterwards the receipt was presented by Walker, bearing to be indorsed by the holder with her mark, and witnessed by Walker's clerk. A renewal of the receipt was obtained for the same amount, the interest being paid to Walker, and by him to the party in whose favour the receipt was. Subsequently, Walker got payment of the last receipt on presenting it, bearing a similar indorsation with the first. The creditors of the grantee afterwards raised an action against the bank for payment of the sum in the receipt, averring that the marks indorsed on it were not made by or with the authority of the grantee. It having turned out that the marks were made by Walker's clerk, and not by the grantee, the bank pleaded that her own agent, who was in possession of the receipt, must be held to have implied authority to receive payment of it; but the Court refused to give effect to this view, and held the bank liable in payment to the grantee's executors. The next case is that of *Sir William Drummond Stewart* v. *The Central Bank of Scotland*, 1859; 21 D. 1180. Here a sum of £300 was deposited in name of Sir William by his accredited factor. The sum was afterwards paid by the bank to the factor, on the receipt being indorsed by him for Sir William D. Stewart. Some years afterwards disputes

arose between Sir William and his factor as to the accuracy of his accounts; and it being discovered that the factor had uplifted the above sum from the bank, Sir William raised an action against the bank for payment, on the ground that the factor had not power to uplift and discharge the receipt, his factory containing powers of general management only. The Lord Ordinary decided against the bank on this ground; but the Court reversed the decision on various special grounds, and, among others, that the factor had taken credit for the deposit in his accounts, and had produced the receipt to the agent of Sir William Stewart, who audited the accounts, and that Sir William afterwards compromised all his claims against the factor, and discharged his representative. The case, however, is important, as bearing on the powers of general factors, and showing that they have no power to uplift their constituents' money from bank, where they are not specially authorised to do so.

# CHAPTER VII.

## CAUTIONARY OBLIGATIONS.

As we shall have occasion to consider hereafter various writs, such as the Guarantee and Cash-Credit Bond, which are regulated to some extent by the rules of law applicable to cautionary obligations, it may be as well, in the first instance, to give a general statement of the law regarding these writings.

A cautionary obligation is an undertaking by which one party interposes his credit as surety for another, and engages to pay the debt, or perform the act, which the principal has engaged to do, if he shall fail to pay or perform.

Cautionary obligations are of two kinds, termed proper and improper—proper where the surety is *ex facie* of the obligation bound simply as a cautioner; and improper, when he is bound conjunctly and severally with the principal as full debtor, though in point of fact a cautioner merely.

**Constitution.**—With the exception of mercantile guarantees, cautionary obligations are constituted by deeds regularly attested, or by holograph writings. A cautionary obligation granted by several parties must be signed by the whole of them, otherwise those who may have signed will be freed from their obligation. In a case where a bond of caution purported to be granted by several parties, and the signature of one of them was forged, all the cautioners were held to be free from the obligation; *Provincial Assurance Company* v. *Pringle*, 1858; 20 D. 465. A distinction, however, was made between an extra-judicial and a judicial bond of caution in the case of *Simpson* v. *Fleming*, 1860; 22 D. 679, where it was held, founding on the mode in which such bonds are prepared and executed, that one of two

cautioners in a bond, lodged in a process of suspension before the Court of Session, was bound, though the signature of the co-cautioner was forged. The creditor must be named in the bond of caution, but it has been held that an obligation as surety for a composition on a bankrupt estate was not void by reason of the creditors not being named, it being quite clear who the creditors were; *Clapperton & Co.* v. *Anderson*, 1881; 8 R. 1004.

**Construction.**—At entering into a cautionary transaction there must be fair and open dealing on the part of the creditor, and every condition on his part requires to be fulfilled. There must be no misrepresentation or concealment of facts which might be material for the cautioners to know, otherwise they will be free. But there is no duty upon a bank agent to give information to a proposed cautioner in regard to the state of the principal's account unless he is asked; and essential error, where not induced by the bank, is no ground for reduction in a question with the bank; *Young* v. *Clydesdale Bank, Ltd.*, 1889; 17 R. 231. These obligations are rigidly interpreted, and the cautioner is entitled to plead every defence competent to the real debtor. It is incompetent for a cautioner to prove by parole a qualification of his written obligation; *Macpherson* v. *Haggarts*, 1881; 9 R. 306.

**Discussion.**—Previous to the passing of the Mercantile Law Amendment Act, 19 & 20 Vict. c. 60, cautioners were entitled to what is called "the benefit of discussion;" but the 8th section of that Act declares that "it shall not be necessary for the creditor to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt, to discuss or do diligence against the principal debtor as now required by law; but it shall be competent to such creditor to proceed against the principal debtor and the said cautioner, or against either of them, and to use all action or diligence against both or either of them which is competent according to the Law of Scot-

land." The Act, however, reserves power to any cautioner to stipulate in the instrument of caution that the creditor shall be bound, before proceeding against him, to discuss and do diligence against the principal debtor. The Act applies only to cautioners for debt, and does not affect cautioners *ad facta præstanda.* Discussion is accomplished by giving the principal debtor a charge to pay on a decree of the Court, and recording the charge; which, by the Personal Diligence Act, is declared to have the same effect as if the debtor had been denounced rebel. The debtor's estate, as well as his person, must be discussed, the moveables by poinding or arrestment and furthcoming, and the heritage by adjudication. Bankruptcy is held to be equivalent to discussion; as also absence from the kingdom, if the debtor has no estate in the country. The cautioner has not the benefit of discussion where he is bound conjunctly and severally with the principal debtor.

**Relief.**—A cautioner who pays the debt has a claim of total relief against the principal debtor, and a right of relief against his co-cautioners to the extent of any surplus beyond his own rateable proportion of the debt. The creditor, on receiving payment, is bound to assign to a cautioner the debt and diligence and any securities held by him, so as to enable the cautioner to operate his relief. A cautioner seeking relief against his co-cautioners is bound to communicate to them the benefit of any ease or security he has received from the creditor or the principal debtor. Where the debt has been assigned to a stranger really in trust for one or more of the co-obligants, he cannot use the assignation so as to bar the claims of relief among the co-obligants; *Gilmour* v. *Finnie*, 1832; 11 S. 193.

The creditor is likewise bound to act fairly and justly to the cautioner, and not to use his right so as to prevent the cautioner from operating his relief. In the case of *Ewart* v. *Latta*, 1863, as revd. by the House of Lords, 1865; 3 Macph. (H.L.) 36, it was held that a trustee on the bankrupt estate of a cautioner was not entitled to an assignation of the creditor's

rights against the principal debtors, without making full payment, and that payment of a dividend was not full payment.

If a new cautioner interposes his credit by a corroborative obligation at the request of the debtor, he is only entitled to a rateable relief as against the former cautioners, but if he becomes bound at their request, he is entitled to total relief from them. In the case of *Reid*, 1826; 4 S. 368, where a company consisting of two partners were bound as cautioners, it was held, in a question of relief with co-cautioners, that the company and its partners were bound to contribute only one share of the debt, not one for each partner, but where a firm, and the partners signed as partners, and as individuals, along with other two co-cautioners, it was held that the partners were cautioners as well as the firm, and that each had a right of relief to the extent of one-fifth of the debt; *Macbride* v. *Clark, Grierson & Co.*, 1865; 4 Macph. 73.

**Retention by Cautioner.**—The opinion has been expressed that a cautioner for a debt presently due may retain against a creditor of the principal arresting in his hands. If the debt is future and contingent, there is no right of retention except in special circumstances, as where the principal is *vergens ad inopiam;* Lords Young and Craighill, in *M'Pherson* v. *Wright*, 1885; 12 R. 942.

**Division.**—Cautioners are entitled to the benefit of division, unless they have expressly renounced it. This benefit renders a cautioner liable only for his own proportion of the debt so long as the co-cautioners are solvent; but on the insolvency or bankruptcy of any of the cautioners, the creditor is entitled to go against the solvent obligants for the whole debt. The rule of law applies to all obligants bound *pro rata;* and, consequently, though they are liable in the first instance only for a proportion of the debt, yet any one of them may ultimately be liable for the whole on the bankruptcy or insolvency of the others.

Where the cautioners are bound conjunctly and severally with the principal debtor, they have not the benefit of division.

**Discharge of the Cautioner.**—A discharge of the debtor, without the consent of the cautioners, is a discharge of them also. And, by the 9th section of the Mercantile Law Amendment Act, a discharge to one cautioner, without the consent of the others, is a discharge to all the cautioners. This provision only applies to cautioners who are bound jointly and severally; *Morgan* v. *Smart*, 1872; 10 Macph. 610. The creditor, however, may consent to a discharge of the debtor, or any of the cautioners, in a sequestration of their estates under the Bankrupt Act, without relieving the other obligants, 19 & 20 Vict. c. 79, sec. 56; but if he accepts a composition under a private arrangement from the debtor, or from any one of the cautioners without consent of the others, they will be free. It is, however, laid down by Professor Bell in his "Commentaries," that if a cautioner, after the insolvency of the principal debtor, refuses to pay the debt, it is not to be expected that a creditor shall abstain from taking what he can get from the debtor's estate; and that the creditor may safely take the composition after having given due notice to the cautioner, provided he reserve his recourse against the cautioner in his discharge to the debtor. It was held, in the case of *Smith* v. *Ogilvie*, 1821; 1 S. 159, that a discharge to the principal debtor, wherein it was stipulated that it would have no effect if the cautioners were thereby relieved, did not free the cautioners.

Cautioners will be discharged by any change in the transaction by which their interests are affected, if the change is made without their consent, and unless it is immaterial or to the benefit of the cautioner. Thus, in the case of *Bonar*, 1850; 13 D. (H.L.) 26, the House of Lords, affirming the judgment of the Court of Session, held that the cautioners for a bank-agent were free, the bank having, without notice to the cautioners, changed the nature of their arrangements with the agent, by which he was subjected to additional loss on discounted bills. If the cau-

tioners' rights are injured by any act of neglect on the part of the creditor they will be free. Thus, if the debt is allowed to prescribe, or if the creditor neglects to complete any security given to him, the cautioner is relieved. Another example will be found in the case of *The British Guarantee Association* v. *The Western Bank*, 1853; 15 D. 834, in which an averment, to the effect that the bank omitted to check the teller's cash in the way pointed out in the proposal submitted to the Association, was held relevant to free the latter as surety for the teller.

The case of *Murray* v. *Lee*, 1882; 9 R. 1040, is instructive. There A was due B £29, and granted him a promissory-note therefor, payable on 11th September, 1881. C granted to B the following letter of guarantee:—"13th August, 1881, A has asked me to say that I will see the £29 paid at the rate of £10 per month from this date, and I undertake that it will be so paid by him." A having failed to pay the first instalment, B, without intimation to C, on 29th September, protested the promissory-note, and on 5th October A was sequestrated. In an action by B against C for the amount of the debt, raised after the last instalment became due, it was held (1) that the letter imported an agreement that B should not enforce payment from A except at the rate of £10 per month, and (2) that B had violated the agreement, and liberated C from his obligation.

A cautioner will also be discharged, if, at entering into the obligation, the creditor misrepresents or conceals facts or circumstances which might be important for the cautioner to know. An example of this will be found in the case of *Falconer* v. *Westland*, 1863; 1 Macph. 704. Here a bank entered into an arrangement with one of their customers, who had become insolvent, whereby it was agreed to abate a portion of the debt, on the customer finding security for the balance. He and two cautioners signed a bond, which narrated a present advance of £2000 by the bank. It turned out, however, that the deed was in truth a security for a composition arrangement, and the Court found that, as the bank had concealed the insolvency and the private composition arrangement from the cautioners,

they were free from their obligation. Several other cases of a similar description are adverted to when treating of guarantees.

If the creditor grants time or indulgence to the principal debtor, the cautioners will likewise be discharged. But the time must be given by *positive* contract. Mere inactivity or forbearance on the part of the creditor will not discharge the cautioner. The creditor is not bound to proceed with diligence against the principal debtor.

**Prescription.**—By the Act 1695, c. 5, cautionary obligations prescribe in seven years. The Act provides that on the expiry of seven years from the date of the obligation the cautioner shall be *eo ipso* free of his obligation. All diligence done, or actions raised, within the seven years, may, however, be proceeded with afterwards. A cautioner who has in error paid after the expiration of the seven years may recover from the creditor. A party bound as "cautioner, surety, and *full debtor*," was found to have the benefit of the Act in the case of *Yuill* v. *Scott*, 1827; 6 S. 137; but parties all bound conjunctly and severally, and not appearing in the bond to be *cautioners*, have not the benefit of the Act, unless a bond of relief has been intimated or communicated to the creditor. Parties granting collateral obligations for lent money have not the benefit of the Act. Nor have judicial cautioners, nor cautioners for the faithful discharge of an office, or for fulfilment of an obligation *ad factum præstandum*; the Act relating to *money* obligations only. The claim of one cautioner against another is not cut off by the Act. It subsists for forty years.

In the case of *Alexander* v. *Badenoch*, 1843; 6 D. 322, an opinion was given by a majority of the judges, that the Act did not apply to a cash-account bond. Lord Mackenzie differed in opinion from the majority. The point has not been formally decided; but the general impression is, that the Act does not apply to a bond of credit; and in conformity with this received opinion, the practice of banks is not to renew their bonds every seven years.

**Cautionary Obligations to or for a Company.**—By the 7th section of the Mercantile Law Amendment Act, it is enacted that "no guarantee, security, cautionary obligation, representation, or assurance granted *to* or *for* a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same in respect of anything done or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm *to* which the same has been granted, or of the company or firm *for* which the same has been granted or made;" unless it be expressly stipulated in the obligation that it shall continue binding notwithstanding such change, or unless the continuance of the obligation be necessarily implied from the nature of the firm, or otherwise.

It will be observed that the enactment applies only to companies *to* or *for* which cautionary obligations have been granted, and does not embrace companies *by* which these obligations have been granted; so that these two classes are affected by different rules of law.

From the plain terms of the enactment it appears that a cautionary obligation to or for a company will not be binding on the granter after any change shall have taken place in the partnership of the firm, even though such change has not been intimated to the holder of the obligation. To guard against such an imminent risk as this, it would be prudent in every cautionary obligation to or for a company to stipulate that it shall continue in force notwithstanding of a change of partners. There is some difficulty as to what is meant by the reservation in the section above quoted, as to the obligation continuing in force notwithstanding of a change of partners, if it shall appear by necessary implication, from the nature of the firm or otherwise, that the obligation is intended to be a continuing one. There is little doubt, however, that obligations to or for public companies, or joint-stock or private companies, which are held to act as permanent companies, would not be affected by a change of partners.

As cautionary obligations by a company are not comprehended in the enactment above referred to, these fall to be regulated by the rules of common law. The question of chief importance for us to consider here is, what effect the dissolution of a company has upon a cautionary obligation granted by them.

The dissolution of a company does not affect the responsibility of the partners for any transactions or obligation entered into previously, if a claim is duly preferred by the creditor. Even retired partners will be responsible for transactions entered into subsequently, unless the dissolution of the company be intimated to their customers, or to those holding their obligations. A creditor dealing with a company is entitled to rely on the credit of the partners as at the date of his obligation, until intimation of the dissolution of the company be sent to him.

A company may be dissolved by the partners voluntarily at any time. It is also dissolved by the death, bankruptcy, or change of the partners. As to what is sufficient intimation of the dissolution of a company, there have been many questions. It is, however, fixed law, that a notice in the *Gazette*, accompanied by advertisements in the newspapers, is *not* sufficient notice, unless a knowledge of these be brought home to the customer. The only safe course to free retiring partners from responsibility is to send written notice to all the customers or creditors of the company intimating the dissolution. It has been held that circulars put into the post office, with a proper address, is good intimation. A change in the name of the firm is good notice, if known to parties dealing with the company.

As to notice to parties dealing with the company for the first time after a change in the partnership, a *Gazette* notice, accompanied with advertisements in the local newspapers, has been held sufficient intimation to free retired partners from responsibility to such parties.

Such are the general principles of law referable to obligations by a company. It follows from these, that a party holding a cautionary obligation by a company ought, on its dissolution being intimated or becoming known to him, to make a claim

against the company and its partners, bound to him, or to get the obligation properly renewed; as, otherwise, it may turn out to be of no value, from the cautioners being freed.

It is advisable in all cautionary obligations by, or for, or to, a company, to stipulate in the instrument that it shall remain binding on the granter notwithstanding the dissolution of the company or change of partners therein. The effect of this clause will be considered when treating of cash-account bonds.

Before leaving this subject it may be noticed, that cautionary obligations by a company ought to be signed by all the partners, particularly if the transaction guaranteed is not within the ordinary line of business of the company. The signature of the company by one of the partners will bind all the others with reference to any transaction within the line of business of the company; and also in negotiable documents, such as bills of exchange, &c.*; but no partner can bind his co-partners in any extraordinary act out of the usual course of business; and as the granting of a cautionary obligation for a third party is not in the usual course of a company's business, it requires the signature of all the partners to make it effectual against the company.

* See page 38.

# CHAPTER VIII.

## GUARANTEES.

A GUARANTEE is defined by the late Professor Bell as an undertaking to be answerable for the payment of a debt, or for the price of goods, or for the balance arising in the course of dealings, or for the performance of an undertaking by another person.

**Constitution.**—By the Mercantile Law Amendment Act all guarantees must now be in writing. Mercantile guarantees are privileged documents, and do not require to be either tested or holograph. It is always a nice question to determine what guarantees are mercantile and what are not. Where there is any doubt on this point, it is advisable that they should be either holograph or tested. It has been decided that a guarantee for an overdraft on a bank account is not *in re mercatoria*. A guarantee by a company, holograph of the acting partner, was held binding, although neither tested nor *in re mercatoria*. See *Buchanan* v. *Dennistoun*, 1831; 9 S. 557, and 1835; 13 S. 841.

**Informal Guarantees perfected Rei Interventu.**—Guarantees, though not *in re mercatoria*, may be perfected *rei interventu*, a principle of law to be kept in view in dealing with imperfect obligations. The doctrine of *rei interventus* is grounded on the fact of the person otherwise imperfectly bound having permitted the other party to proceed on his own obligation or agreement as if it were complete, and to perform acts referable to, or resulting from, the agreement, and which, by the refusal to execute the agreement, would prove detrimental to the person so misled or encouraged to proceed (Bell's "Princi-

ples," sec. 26). This may be illustrated by the case of *Johnston* v. *Grant*, 1844; 6 D. 875, where it was held that although a letter of guarantee to a bank agent for an over-draft was not *in re mercatoria*, and neither tested nor holograph, it was binding in consequence of operations known to the granter having been permitted by him to proceed as if it was a valid document. See *Ballantyne* v. *Carter*, 1842; 4 D. 419.

The terms of a guarantee ought to be distinct and intelligible as to what is undertaken, and all limitations expressed in it must be strictly attended to. Guarantees are limited to the parties to whom they are addressed. An exception to this, it is said, takes effect in the case of guarantees attached to bills; but the question appears to be doubtful. See *Sir William Forbes* v. *Macnab*, 1816; 19 F.C. 137.

It has been held in England, that where the neglect to give notice of dishonour produced loss or prejudice to the granter of the guarantee, he is free from his obligation, so that the prudent course, in the event of the dishonour of the bill, is at once to give notice to the guarantor. The principles explained in the preceding chapter, applicable to the discharge of caution by giving time, surrendering securities, concealing important facts, or discharging co-obligants without the consent of the rest, or by neglect, hold also with reference to guarantees.

Guarantees do not prescribe in seven years under the Act 1695 c. 5 (*Wilson* v. *Tait*,* 1840; 1 Rob. 137).

**Relief.**—A guarantor, if he pays up the full amount, is entitled to relief from the principal debtor. In the case of *Harvie's Trustees* v. *Bank of Scotland*, 1885; 12 R. 1141, it was held that the guarantor, though he had paid up the full extent of his liability, as that was not sufficient to extinguish the creditor's claim, was not entitled to rank in competition with the creditor in the bankrupt estate of the principal debtor. The circumstances of the case were these:—H granted a letter of guarantee

* This case is instructive as to the distinction between guarantee and caution.

to a bank guaranteeing "due payment of all sums for which M is, or may become liable to you, the amount which I am to be bound to pay under this guarantee, not to exceed £15,000, and I further declare that I shall not be entitled to demand from you an assignation of this guarantee, so long as the said M is indebted to you in any sums such as aforesaid. This guarantee is to remain in force, notwithstanding my death, until recalled in writing, and shall be without prejudice to any other securities or remedies which you have or may acquire for the general obligations or any particular obligation of the said M." The estates of M were sequestrated, and shortly thereafter H paid into the bank £15,000 to be held by them provisionally in full of any liability under the guarantee. After H's death his trustees claimed in the sequestration for a ranking in the sequestration as ordinary creditors to the extent of £15,000. The bank also claimed to the amount of £44,000, the amount due to them by M at the date of his sequestration. They did not deduct the amount guaranteed by H from their claim. The trustee in the sequestration rejected the claim of H's trustees, and sustained that of the bank, and that deliverance was sustained on appeal.

## CHAPTER IX.

### CASH-CREDIT BOND.

This instrument is peculiar to Scotland. The cash-credit was instituted by the Scotch banks at an early period of their history, and it has been a chief means of fostering the trade of the country. It is thus described by Mr. Hume in his essay on the "Balance of Trade":—"A man goes to the bank and finds surety to the amount, we shall suppose, of a thousand pounds. This money, or any part of it, he has the liberty of drawing out whenever he pleases, and he pays only the ordinary interest for it while it is in his hands. He may, when he pleases, repay any instalment so small as five pounds, and the interest is discounted from the very day of the repayment. The advantages resulting from this contrivance are manifold, as a man may find surety to the amount of his substance; and his bank credit is equivalent to ready money. A merchant does here in a manner coin his houses, his household furniture, the goods in his warehouse, the foreign debts due to him, and his ships at sea, and can, upon occasion, employ them all in payment as if they were the current coin of the country. If a man borrow a thousand pounds from a private hand, besides that it is not always to be found when required, he pays interest for it whether he is using it or not. His bank credit costs him nothing except during the very moment it is of service to him, and this circumstance is of equal advantage as if he had borrowed money at much lower interest."

**Form.**—The bond proceeds on the narrative that the granters have obtained a credit with the bank of a specified sum, in name of the party for whose behoof the credit is to be opened, and

they bind and oblige themselves and their heirs, &c., conjunctly and severally, to pay to the bank on demand, all such sums, not exceeding the amount of the credit, as are or shall be due to the bank from the party using it, whether drawn out by him or for which he is liable by any drafts, orders, bills, promissory-notes, indorsements, &c., with interest. The bond provides that any account or certificate, signed by the cashier or accountant, or some other officer of the bank, shall ascertain, specify, and constitute the sums or balances of principal and interest to be due on the account, and shall warrant summary diligence on the bond, for which no suspension shall pass but on consignation only. Where the credit is for behoof of a company, or where a company are sureties, the bond specially provides that it shall be binding, notwithstanding of any deaths, retirements, substitutions, additions of partners, dissolution of copartnery, or change therein.

It is almost unnecessary to repeat here that the bond must be signed by all the parties, otherwise the sureties who have signed will be free; and that, where a company are sureties, the bond must not only be signed by the firm, but by all the partners. The bond must be delivered. Where one of the co-obligants, having signed the deed, dies before delivery, the implied mandate to deliver falls, and the deed being in fact undelivered, his executors are not liable; *Life Association of Scotland* v. *Douglas*, 1886; 13 R. 910.

**Rights of the Sureties.**—It will be observed, from the terms of the bond, that the character of the sureties as cautioners is suppressed, and that they are all bound as principal debtors. The bond, however, discloses on its face that the credit is given to only one of the granters, and the sureties are therefore entitled to the equitable rights of cautioners, except that they have no right to the benefits of discussion and division, and of the septennial limitation. In dealing, therefore, with the sureties for a cash account, the general rules of law applicable to cautionary obligations, before explained, require to be kept in view. If

the bank does any act which will have the effect of prejudicing the rights of the sureties, such as discharging one of them without the consent of the others, or surrendering securities, or giving time by positive contract after a demand of payment has been made, the obligants will be discharged. An instance of discharging the sureties for a cash-account, by the bank liberating one of them without the others' consent, will be found in the case of the *British Linen Company* v. *Thomson*, 1853; 15 D. 314. On the account being paid up by the sureties, they are entitled to an assignation of all securities which the bank may have otherwise acquired from the principal debtor for that special account.

In the case of *Hamilton* v. *Watson*, in the House of Lords, 1845; 4 Bell 67, an obligant on a cash-credit bond suspended a charge on the ground that the bank did not disclose to him, before signing the bond, the fact that the party in whose favour the credit had been obtained stood indebted to them under a prior bond for a similar amount, and that the bank, on obtaining a draft, applied the sum of the new credit in payment of the old one, contrary to the intention of parties and the nature of the credit. The House of Lords held this plea irrelevant, and that the obligant was liable. It follows, therefore, from this decision, that in ordinary cases a bank is quite entitled, on obtaining a draft from the holder of a new credit, to apply the amount of it in payment of an old debt due to them. It must be kept in view, however, that there must be no misrepresentation on the part of the bank, or concealment of unusual circumstances. As already seen from the case of *Falconer* v. *Westland*, 1863; 1 Macph. 704 (*vide* Cautionary Obligations), the concealment by the bank of an important circumstance known to them, such as the *insolvency* of the principal, would destroy the obligation.

**Operations on the Account.**—For every operation on the account there should be a regular and authentic voucher. The bank books are not evidence of a payment to a customer; and it

has been decided, that where the customer appeals to the bank books in evidence of the state of accounts, he is entitled to found upon the entries to his credit, while he is not bound by the entries on the other side. In the case of the *Commercial Bank* v. *Rhind*, 1860; 22 D. (H.L.) 2, it was decided by the House of Lords, that where a sum was by mistake entered twice to the credit of a customer in his pass-book, the pass-book only afforded *prima facie* evidence of the payment, liable to be rebutted; but that the *onus* of proving the entry to be a mistake lay upon the bank. Entries in the pass-book of sums paid into the bank are *prima facie* evidence against the bank that the money has been paid in, but they are not conclusive evidence; *Cowper's Trustees* v. *National Bank*, 1889; 16 R. 412. The necessity for a voucher for every operation is shown by the case of *Paterson*, 1844; 6 D. 987, where it was held that a balance due by the holder of a credit transferred to the debit of the cash-account, without a draft or authority from the holder, was an unauthorised and illegal operation; and consequently, that the sureties were not liable for such balances.

The bond is so framed as to allow the bank to carry to the debit of the account overdue bills, &c., of the holder. It was at one time doubted whether, if such bills were not carried into the account at the time they were discounted, they could afterwards be brought in so as to make the sureties for the credit liable for them. This point was decided in favour of the bank in the case of *Liddell* v. *Sir William Forbes & Co.*, July, 1820.

**Overdrafts.**—The sureties for a cash-account are not liable for any sums overdrawn beyond the extent of the credit; and, as will be afterwards seen, interest which has been accumulated in the books of the bank with the principal, falls to be treated as *principal* in the same way as if the holder of the account had granted a draft for it. Questions with sureties have arisen, whether sums paid into the credit of an overdrawn account fall to be applied by the bank in reduction of the sum for which the sureties are bound, or in payment of the overdraft. The gene-

ral rule of law is, that a creditor, in distinct transactions, is entitled to apply sums received from his debtor in liquidation of whatever debt he pleases; but there is no room for the application of this principle to a current account, where all the sums paid in form one blended fund, the parts of which have no distinct existence. In a well-known case, *Devaynes* v. *Noble*, 30th July, 1816, the Master of the Rolls thus stated the law as to the appropriation of sums paid into a bank account:—"In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash-accounts. Where there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has or has not been discharged but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head instead of the foot of it." It follows, therefore, that so long as the liability of all the obligants continues, the result is the same, whether sums paid into the credit of an overdrawn cash-account be applied to the overdraft, or to the amount of the credit; because, if applied to the credit, then it is reduced within the limit for which the sureties are bound, whereupon a corresponding amount of the overdraft comes into operation, and the credit is again exhausted. Two important results, however, follow from the application of the above principle to cash accounts:—

1. Where a bill has been debited to the account, and sums are subsequently paid in equal in amount to the balance due on the credit as at the date of debiting the bill, the bill will be held as paid, notwithstanding that a balance due to

the bank afterwards arises on the account. The bank, therefore, could not recover the bill from any of the obligants on it. This point was determined in the case of *Lang* v. *Brown*, 1859 ; 22 D. 113.

2. Where from any cause the liability of the sureties ceases, as at a particular date, and where the balance then due is afterwards extinguished by subsequent payments into the account, the bank will have no claim against the sureties for any balance which may afterwards arise by operations on the accounts. In illustration of this, reference may be made to the case of *Christie* v. *The Royal Bank*, 6th April, 1841 (Ross's leading cases). There Robert Allan & Son obtained from the bank a credit of £20,000 ; in security of which Thomas Allan, one of the partners, conveyed to the bank the estate of Lauriston. He died in the following year, when the credit was fully drawn out. Thomas Allan's son was assumed as a partner of the company, which continued to carry on business under the same firm. The new company obtained another advance of £22,000 from the bank, which was paid into the former account, on which operations continued to be made. The firm afterwards became bankrupt, when they were debtors to the bank in £42,000, with interest. The trustees on Thomas Allan's individual estate raised a reduction of the security given by him in the first bond, on the ground that it was granted by him for a credit to the company, of which he himself was a partner ; that this company, being dissolved by his death, of which the bank, of course, had a perfect knowledge, and the balance then due (when his liability terminated) being subsequently paid by the crediting of the £22,000, his estate was liberated from the obligation under the bond. The House of Lords, affirming the judgment of the Court of Session, gave effect to this view ; the Lord Chancellor remarking, that it was "quite clear that the security which Thomas Allan so gave to the bank, to secure the repayment of advances made to the firm in which he was a partner, could not be used as a security for advances made after his death to a firm in which he was not a partner ; this is, to the

persons who had been his partners, whether they continued the old style and firm or adopted another."

**Accumulation of Interest with Principal.**—It has been the invariable practice of banks at the close of the financial year to accumulate the interest arising on a cash or current account with the principal sum; and to carry forward the accumulated amount to the next account on which interest was charged or allowed as the case might be. In claiming payment from the sureties for a cash-account overdrawn, the general practice of banks was to charge interest, accumulated annually, on the principal sum in the bond from the date at which the overdraft commenced, besides interest on the fluctuating balance within the credit from the previous annual balance. This practice, however, was expressly ignored by the Court in the important decision of *Reddie* v. *Williamson*, 1863; 1 Macph. 228.* In this case it was decided that the interest, when accumulated with the principal sum, became *principal*, just as if a draft had been given for the amount, and that the bank could not afterwards separate the interest thus accumulated, as in a question with sureties. If the amount by the accumulation of interest is swelled beyond the limits of the bond, the sureties will not be liable for the excess, because then it ranks as an overdraft. The practical result, therefore, is, that sureties for a cash-account overdrawn are only liable for the sum in the bond and interest thereon from the last date of accumulation. In pronouncing judgment, the Lord Justice-Clerk remarked that if the bank, instead of demanding the interest from the co-obligants due at the end of the year,

* Lord Benholme's judgment in this case is remarkably instructive as containing a view of the liability of the cautioners diametrically opposed to the opinion pronounced by the Court, but apparently at the same time in direct harmony with the obligation contained in the bond of credit. The case was, on the whole, peculiar and complicated, and it might have been expedient for the Scotch banks to have obtained the opinion of the Court of last resort.

choose, in concert with the obligant who is authorised to operate on the account, to avail themselves of their privilege of accumulating the interest, without any communication with the other obligants, they are dealing with the account, as far as these other obligants are concerned, in precisely the same way as if the leading obligant, instead of paying the interest, had given the bank a cheque for the amount with which the bank extinguished the interest, and then placed the amount of the cheque to the debit of the cash-account as an ordinary draft. The moment that interest is converted into principal, the amount of it must be reckoned as part of the drafts on the credit, or beyond the credit, for which the party operating on the account will be liable, as principal, in any event, but for which the other co-obligants cannot be held as liable, if it swells the debit side of the account beyond the limits of the cash-credit. Lord Cowan observed that, having reaped the benefit of the mode in which the accounts are stated, by interest being calculated on the successive accumulated sums, the bank cannot be permitted to repudiate their own principle of accounting. Hence it is that the balance carried to the following year fixes the amount of principal due upon the account under the cash-credit bond, and any sum beyond the amount stipulated in the bond becomes an overdraft, with which the obligants have no concern.* Observations were made upon this case of *Reddie*, in the subsequent case of *Gilmour* v. *The Bank of Scotland*, 1880 ; 7 R. 734, where it was held that, just as the bank are not entitled to go further back than the last balance preceding the termination of the account, to calculate the interest due, so on the other hand they *are* entitled to go back to that last balance and recover interest on the account as at that date.

**Cash-Accounts in name of a Company, and the effect of Changes in the Partners.**—It is the invariable practice now to

* The First Division, in the very recent case of the *Commercial Bank of Scotland* v. *Pattison's Trs.*, 1891; 18 R. 476, have confirmed the principles laid down in *Reddie*.

introduce into bonds of credit a stipulation to the effect that in the event of any change in the copartnery of a firm having a credit with the bank, the obligation is to continue on the part of the cautioners, the Mercantile Law Amendment Act having provided that no cautionary obligation, either to or for a company, should be binding on the granter for anything done after a change shall have taken place in the partners of the company for which the same has been granted, unless the intention of the parties that such cautionary obligation, &c., should continue to be binding, notwithstanding such change, should appear by express stipulation, or by necessary implication, from the nature of the firm or otherwise.

Difficulties may, however, arise in regard to the obligation of the new company itself. In strict law, a bond granted by a company binds that company only, and it cannot be so framed as to bind a company which is not in existence. To make the new company or the new partners liable, they must, after the new company is formed, themselves adopt the bond or consent expressly or implicitly to become liable therefor. If the new company continues to operate on the account, it would become liable to the bank, not, however, under the bond, but in virtue of the cheques signed by the new company. But suppose that the credit was fully drawn out at the dissolution of the old company, and that the new company became bankrupt without ever having operated on the account, or having expressly adopted it, as in a question with the bank, would the bank have a claim to rank upon the estate of the new company? This question would entirely depend upon the arrangements between the old and new companies. If the new company took over the whole stock and assets of the old, the former would be liable for the business debts of the latter. In the case of *Miller* v. *Thorburn*, 1861; 23 D. 359, a question of this kind was decided. Samuel Dickson obtained from a bank a cash-credit of £200. He afterwards assumed his son as a partner, and carried on business under the firm of Samuel Dickson & Son, but the credit continued to be operated

on by Samuel Dickson. The firm having become bankrupt, the bank lodged a claim to rank on the company's estate for the amount of its debt, which was rejected by the trustee. On appeal, the Court of Session held, after inquiring into the circumstances and examining the contract of copartnery, that the bank was entitled to rank, the debt being a trade one. In deciding the case, the Lord Justice-Clerk laid down the general principle that, "where a new firm takes over the whole stock and business of a going concern, it is held also to take over the whole liabilities."

It frequently happens in practice that a company and its partners bind themselves *as sureties* for a cash-account in name of another party. Much practical difficulty has been felt as to the effect upon the bond of a dissolution of the company by the retirement or change of partners. As before explained, it is *ultra vires* of one company, or the partners thereof, to bind a new company and different partners without the consent of such new company and partners; so that, in the case of a change in a company who are *sureties*, the new company and incoming partners would not be bound as cautioners under the bond, and it would make no difference though the change in the surety firm was not intimated or known to the bank. But the loss of the company's obligation is not the only difficulty that arises upon its dissolution. A distinction has been drawn by some lawyers who have considered this question, between the case of a company bound as principal and the case of a company bound as a surety merely. In the latter case, opinions have been given that intimation by a partner of his retirement from the company, is in reality intimation that he withdraws from the bond, and that the bank is not in safety, after receiving such intimation, to allow the credit to proceed without freeing the other sureties. The clause in the bond binding the obligants, notwithstanding any change in the company, does not seem to meet the difficulties arising out of a dissolution of a copartnery bound as a surety. The partners who have retired are necessarily freed from their obligation under the bond as

cautioners, by operations being allowed after their retirement has been made known or intimated to the bank; and the right of relief of the remaining sureties, against such retiring partners, is consequently lost. The right of relief is not renounced in the bond by the sureties, nor can it be so framed as to admit of this being done. It would therefore appear, that if operations under a bond of credit are permitted, after the retirement of partners from a company bound in the capacity of a surety, the remaining cautioners would be freed from their obligation, on the principle that the discharge of one surety without the consent of the others frees the whole.

On the principles above stated, it likewise follows that partners who have intimated to the bank their retirement from a company, in whose name a credit may have been opened, would be free from liability for operations on the account after such intimation was received by the bank.

It is, consequently, very expedient to have the bond renewed or corroborated on the dissolution of a firm bound either as principal or surety.

**Termination of the Bond.**—The credit subsists till it is put an end to by the sureties intimating to the bank their withdrawal from the obligation; which they may do at any time. The bond does not fall by the death of one or more of the sureties, but continues binding upon their representatives until they give notice to the bank that they withdraw from the obligation. The soundness of this doctrine has been frequently questioned, but it is now conclusively settled by the case of *The British Linen Company* v. *Menteith*, 1858; 20 D. 557. In this case the credit was operated on for several years after the death of the co-obligants. The bank did not intimate the existence of the bond to their representatives till after the death and insolvency of the party in whose favour the credit was opened. The Court held, that as the representatives had not given notice to terminate their liability, the bank was entitled to recover all advances made before or subsequent to

the death of the co-obligants. At the same time, it is but proper that the bank should give notice to the representatives of deceased obligants, especially when the legal representatives are merely trustees, because if, after lapse of six months, the trustees or executors divide the trust funds among the beneficiaries, in ignorance of the existence of any such cautionary obligation, no claim can be made against the executors or trustees, and circumstances may arise in which there may be strong ground for maintaining that the beneficiaries are not liable to repeat their shares on the principle that they had, in good faith, received and consumed their interest in the deceased's estate.

In the case of *Johnston* v. *The Commercial Bank*, 1858; 20 D. 790, it was held that a bank is entitled to bring a cash-account to a close before it has been operated on to the full extent, provided the bank does not act capriciously, and gives the party due notice of its intention to refuse further credit.

**Diligence on the Bond.**—The bond provides that a stated account certified by an officer of the bank shall ascertain and constitute the amount due on the credit, and shall warrant all necessary diligence against the granters. In virtue of this stipulation, and of the consent to registration for execution, the bond and certificate may be recorded and a charge given to the obligants on the extract. It is, however, not unusual to proceed by letters of horning on the bond and certificate, as some practitioners have doubts (which are apparently groundless) whether the Personal Diligence Act is applicable to the case of a bond of credit; but the method first mentioned has been frequently adopted in practice without objection. The renunciation by the obligants of their right to suspend a charge, except on consignation, is not binding, being contrary to the principles of public law. It is perfectly open, therefore, to the obligants to challenge the accuracy of the account by way of suspension without consignation, but caution will be generally insisted on.

**Cash-Account on Bills.**—Advances are frequently made by banks on current accounts against bills deposited in security. Where the bills so deposited are trade bills, or where the drawer has given value to the acceptor, the bank, as onerous holders, may recover from the obligants by summary diligence. But where no value has been given by the drawer, the bill being accepted merely for the purpose of obtaining advances from the bank, the security is frequently attended with disadvantage. Bills of this latter kind are merely cautionary obligations, and the obligants, who are not the proper debtors, are entitled to the rights and privileges of cautioners. The rules applicable to cautionary obligations have already been explained, but some of the disadvantages which have been found to attend bills deposited in security may be mentioned.

In the case of the *British Linen Company* v. *Thomson*, 1853; 15 D. 314, it was decided—1st, that the granters of a security-bill for a cash-account were not liable, unless it was proved that when the bill arrived at maturity there was a balance due by the true debtor, although subsequently a balance arose; and 2nd, that the bank having discharged one of the obligants on the security bill, who became insolvent, by accepting a composition from him, without consent of the others, they were released from their obligation.

Then as to security-bills granted by a company to a bank, which takes them in the knowledge that they are security-bills, if the firm only is signed the company will not be bound, but only the partner who adhibited it, he having no power to bind the company in a cautionary obligation, which requires the signature of all the partners. Again, though the bill be signed by all the partners, it will not be binding on the new company for anything done under it after a change shall have taken place in the partners comprising the firm.

Another objection of some force has been stated to bills being made a special security for advances on current account, viz., that every sum paid into the credit of the account pays and extinguishes the bill to that extent, and it cannot again be

revived. To hold otherwise would be to confer on a bill all the privileges of a cash-credit bond. Questions of this kind, however, very much depend on the circumstances attending the particular transaction.*

We shall afterwards, under the head of Banker's Lien, have occasion to consider the rules of law applicable to bills coming into the hands of a banker in the ordinary course of business.

**Cash-Accounts on Minutes passed by Public Bodies.**—Cash-Accounts to public bodies based upon a minute passed at a meeting of the body, or of its managers, are very common in practice; but in such cases, the bank look chiefly to the responsibility and honour of the borrowers. A minute is not a legal way of constituting a debt; but assuming that the body passing the minute has full power under its constitution to borrow money, and that the money so borrowed is applied for its benefit, the minute, with the cheques upon the account, would form a good ground of action against the borrowers. It is to be observed that the managers or directors of public bodies thus borrowing, are not personally liable for the debt, unless they specially bind themselves for it; and the bank has, therefore, only to look to the funds and property of the institution for repayment.

In arranging a credit of this kind, the matter principally to be kept in view is, whether the credit is intended to be a standing credit or for a temporary purpose merely. The Commissioners of Supply for Counties, for example, frequently obtain a credit on the security of assessments for the current year; and in a case of this kind, the minute ought to be renewed annually. The minute ought distinctly to state the purpose for which the credit is to be applied, and the assessment which is to form the basis of security; and should contain a clause binding the commissioners to make and levy the assessments, and pay them over

* Hence it is advisable to discount the bill, and make the banker the onerous holder of it, and thereby all questions with third parties are avoided.

to the bank towards reduction of the credit. It is of great practical importance that the minute should explicitly state who is to make the operations on the account.

A public body which is constituted by, or works under an Act of Parliament, generally has its powers for borrowing money defined in the Act; and if the loan is to be made under the Act, its provisions require to be carefully complied with, and the security prepared in the statutory form, otherwise there might be risk of loss in the event of the debt being afterwards repudiated. When a credit to a public body so constituted rests upon the minute of a meeting, the security is of course not under the Act, and the bank simply relies upon the good faith of those with whom they contract. The terms of these minutes vary according to the object for which the credit is wanted, and the nature of the security proposed.

It may be here observed, that Parochial Boards have power to borrow only to the extent of one-half of the assessment which may be outstanding for the current year, and that no new debt can be legally contracted until the prior debt has been repaid.

School Boards are not entitled to borrow money by means of an overdraft. See *The Queen* v. *Sir Charles Reed*, Law Reports, 5 Queen's Bench Division, 483; but this decision does not forbid a School Board over-drawing its account with a bank in the course of its ordinary transactions, and even if the sum be borrowed by way of an overdraft, the School Board will be bound to pay the amount of the overdraft out of the school rate, provided that the sum borrowed has been applied for proper School Board purposes. Held in the case of *The Commercial Bank* v. *The Lady Parish School Board*, by Lord Rutherfurd Clark, 1878, not reported.

## CHAPTER X.

### HERITABLE AND OTHER SECURITIES.

**1. Bond of Credit and Disposition in Security.**—Previous to the year 1814 cash-accounts were granted on personal security only, for, as the law then stood, a disposition of heritage in security was of no force as to any debts contracted after the security was granted (See Act 1696, c. 5). By the Bankrupt Act of that year, 54 Geo. III. c. 137, on the narrative that it would tend not only to the benefit of commerce, but also of agriculture and manufactures, it was made lawful "for any person or persons possessed of lands or other heritable subjects to pledge the same in security of any sums paid, or balance arising or which may arise, upon cash accounts or credits: Provided always that the principal and interest which may become due upon the said cash-account or credit shall be limited to a certain definite sum, to be specified in the security; the said definite sum not exceeding the amount of the principal sum and three years' interest thereon at the rate of five per centum." On the repeal of the above Statute this provision was re-enacted by the 19 & 20 Vict. c. 91. (See also 31 & 32 Vict. c. 101, secs. 3 and 134.)

The form of the bond now in use is just the Personal Bond of Credit and Mortgage combined, containing a provision, in terms of the enactment, limiting the security over the heritages to the principal sum of the credit and three years' interest at five per cent. Though the security as regards the heritages is thus limited, the bank may, under the personal obligation, recover from the obligants any greater sum that may be due on the account.

If the heritages are conveyed in security by a party other

than the holder of the credit, the party to whom the heritages belong, though not personally bound for the credit, is, as regards the security given by him, entitled to all the rights and privileges of a cautioner, so that, in dealing with such securities, the rules of cautionary obligations require to be kept in view, as an infringement of these would have the effect of discharging the security.

The personal obligation in the bond is enforced in the same way as the moveable bond; and the heritages may be sold after a notarial intimation has been given to the debtor to pay the sum due within three months after the date of demand, and after the heritages have been advertised for sale for six weeks in an Edinburgh and local newspaper.

The heritages being conveyed in security of a specified sum only, the bank, as in a question with other creditors, is not entitled to apply, in the payment of other debts, any surplus of the security that may remain after satisfying the particular debt for which it was given.

**2. Bond and Disposition in Security.**—The distinctive character of the bond is, that it is a security for a sum instantly advanced on loan, repayable at a specified term, and bearing interest payable half-yearly, during the non-payment. The bond does not secure any sums advanced by the creditor after delivery. Nor does it, like the heritable bond for a cash-account, admit of sums paid in to the credit of the advance being again drawn out. All sums paid in to the credit of the advance extinguish the mortgage to the extent of the sum so paid in, and the security subsists only for the balance.*

In practice, however, it is not uncommon for bankers so to deal with the bond as to make it an indirect general security to the extent of the sum contained in it. The transaction is accomplished in this way: the whole sum in the bond is paid over to the granter, and entered as a loan in the books of the

* For the form and import of a Bond and Disposition in Security, see 31 & 32 Vict. c. 101, secs. 118 and 119.

bank; after which the granter pays in the sum advanced, or whatever portion of it he may not require at the time, to the credit of a deposit-account in his own name, on which operations may be made according to arrangement. The banker has then a right of lien over the sum at the credit of the deposit-account, out of which he is entitled to payment of any bills or other obligations which he may hold binding on the depositor. The loan may then be liquidated by means of the security given in the mortgage. In the case of *Bell's Trustees* v. *Bell*, 1884; 12 R. 85, a bond and disposition in security was granted to a bank as security for an obligation to repay a sum of £10,000, set forth as borrowed by the granter, "and of the sums that may be disbursed" by the bank for repairs, insurances, &c., on the subjects conveyed. No money was advanced by the bank at the date of the bond, which was used as a cash-credit bond. On the death of the granter the value of the subjects was found less than the sum due to the bank. It was held that whether the bond was or was not struck at by the Act, 1696, c. 5, it was binding on the granter's representatives, and that the granter's intention to create a heritable debt was clear, and, therefore, that the other heritable estate of the granter was liable for the balance due under the bond to the relief of the executor.

A real security cannot be given for an indefinite sum of money. Thus a disposition in security of the damage to be sustained by mineral workings is bad. *Smith Sligo* v. *Dunlop & Co.*, 1885; 12 R. 907.

The creditor in a mortgage, if his interest falls into arrear, may enter into possession of the subjects, and secure the moveables therein by poinding the ground, a process which will be afterwards explained.

The holders of bonds are entitled to priority according to the date at which the instrument is recorded, and not according to the date of the instrument.

**3. Securities over Leasehold Subjects.**—Until the passing of the Registration of Leases (Scotland) Act, 1857, it was

incompetent to grant a bond over subjects held under long lease. The method previously adopted for creating securities over these subjects was, by the lender taking an absolute assignation to the lease, and intimating it to the landlord, and then sub-letting the subjects to the true owner. These securities were felt to be attended with disadvantage, and sometimes with risk. But a great improvement in the constitution of such securities was introduced by the above Act, which puts them on an equal footing with the ordinary bond and disposition in security.

The 4th section makes it lawful for the party in right of a lease recorded in terms of the Act, to assign the same in security of borrowed money, or in security of cash-credits, or other legal debt or obligation; and provides that the recording of the assignation shall complete the right thereunder; and that such assignation in security, so recorded, shall constitute a real security over such lease to the extent assigned. The 6th section provides that the creditor, or other party in right of the assignation in security, without prejudice to the exercise of any power of sale therein contained, shall be entitled, in default of payment of the capital sum for which such assignation in security has been granted, or of a term's interest thereof, or of a term's annuity for six months after such capital sum or term's interest or annuity shall have fallen due, to apply to the Sheriff for a warrant to enter on possession of the lands and heritages leased, and the Sheriff, after intimation to the lessee for the time being, and to the landlord, shall, if he see cause, grant such warrant, which shall be a sufficient title for such creditor, or party, to enter into possession of such lands and heritages; and to uplift the rents from any sub-tenants therein; and to sub-let the same as freely, and to the like effect, as the lessee might have done; provided always, that no such creditor, or party, unless and until he enter into possession as aforesaid, shall be personally liable to the landlord in any of the obligations and prestations of the lease. There is a considerable difficulty with regard to this form of security, in the fact that the assignee's title can only be properly completed by possession. Where a

joint-stock company had assigned leases of minerals, of which they were tenants, in security of sums advanced on debentures, it was held that the debenture holders, who had intimated the assignations to the landlord, but had taken no steps to enter into possession, had no preference as regarded the leasehold property over the ordinary trade creditors of the company. *Clark & Co.* v. *West Calder Oil Company*, 1882; 9 R. 1017.

The form of the bond annexed to the Act contains a power of sale, in default of payment, in the same words as the bond and disposition in security; and the procedure prescribed for carrying through the sale is the same as in selling under a bond and disposition in security. See sec. 20, and 10 & 11 Vict. c. 50.

**4. Mortgages on Ships.**—These securities have never been in favour with bankers, in consequence of the difficulties in the way of making them available, and of the risks involved. They have, however, been put on an improved footing by the Merchant Shipping Act of 17 & 18 Vict. c. 104, both as to their constitution and the responsibilities attaching to mortgagees. By the provisions of the 70th section of the Act, a mortgagee is relieved from the risk of being held responsible for furnishings of the owner. If, however, the mortgagee enters into possession of the ship, he may render himself liable for furnishings. The constitution of a mortgage over a ship is now a very simple matter.

A registered ship, or any share in it, may be made a security for a loan or other valuable consideration. The instrument termed a "mortgage" must be in the form annexed to the Act; and must be registered in the Register Book of the port at which the ship is registered. The Registrar is directed by the Act to record mortgages in the order in which they are produced to him, and to notify on the instrument the date and hour of registration—(secs. 66, 67).

If there is more than one mortgage registered of the same ship, the mortgages are entitled to priority according to the date

of *registration*, and not according to the date of the instrument —(sec. 69).

A mortgagee is not deemed to be the owner of the ship or share, nor does the mortgagor cease to be the owner, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt—(sec. 70).

Every mortgagee has power absolutely to dispose of the ship, or of any share in respect of which he is registered, and to give effectual receipts for the purchase money; but no subsequent mortgagee has power to sell, except with the concurrence of every prior mortgagee, or under the order of a competent court —(sec. 71).

A mortgage is not affected by any act of bankruptcy by the mortgagor after the date of registration; and it is preferred to any right, claim, or interest, which may belong to the assignees of such bankrupt—(sec. 72). In the case of *Anderson* v. *Western Bank*, 1859; 21 D. 230, this provision was held not to bar a trustee for creditors challenging a mortgage, as a voluntary security granted for a debt, within sixty days of bankruptcy.

Mortgages over ships are exempt from stamp duty.

Bills of sale (of ships) taken as securities are to be avoided, for the bank thereby become owners, with all the serious responsibilities incident thereto, such as questions with shippers, collisions, &c.

## CHAPTER XI.

### SECURITIES FOR GENERAL ADVANCES AND CONTRACT OF PLEDGE.

A SECURITY which is intended to cover all advances, whether made at the time or subsequently, is constituted by an *ex facie* absolute conveyance or transference of the property. The effect of a security so constituted, is to vest the holder with an absolute right of property, qualified by a personal obligation only to restore the subject on payment of all advances made to the debtor by the holder of the security. The subject of such securities may be either a heritable or moveable right.

**1. General Security over Heritages.**—This security is constituted by an absolute disposition in favour of the creditor, recorded in the appropriate Register of Sasines. The conveyance is generally qualified by a back-bond or letter, binding the creditor to reconvey the subjects on payment of all advances. It is settled, that though the back-bond should bind the creditor to reconvey, on being paid a sum specified in it, yet while the back-bond remains unrecorded, the creditor is not bound to reconvey till he has been repaid any further sums that may have been advanced by him afterwards on the faith of the security. But on the back-bond being recorded in the Register of Sasines, or produced in judgment, the security will be restricted to sums advanced previous to the date of its being so recorded or produced, and this should be carefully kept in view. Another important restriction of the security is exemplified in the case of *The Union Bank of Scotland* v. *The National Bank of Scotland*, 1886; 14 R. (H.L.) 1. A bank held a recorded absolute disposition granted by A of certain subjects which by back-

letter it agreed to hold "in security, and until full and fixed payment of all sums of money now due, or which may hereafter become due." The back-letter was not recorded. A afterwards, for onerous considerations, granted to another bank a deed by which she disponed her whole right and interest and right of reversion in the subjects. Intimation of the assignation was made to the first bank. Thereafter advances were made to A by both banks. In a competition between the two banks it was held that in a question between the two banks, the first bank's security was limited to advances made prior to the date when the assignation was intimated. Lord Watson thus explained the legal position of the parties:—"As regards third parties who transact with him on the faith of the public records, the powers of the disponee are not affected by the private contract (*i.e.*, the back-bond), and he can sell or burden the estate, and can give a valid title to the purchaser or encumbrancer, although the creation of these rights should be in direct violation of the terms of the back-letter. But in a question with the disponee himself, or with persons who through him have acquired an interest in the estate or in the personal contract, the disponee is affected by the back-letter, and is treated as the holder of a mere security. In all such cases, the rights of parties must be determined, not according to the form of the disponee's title, but according to the substance of the transaction."

The usual practice in taking a security by way of absolute disposition and back-letter is to stamp the disposition with a general deed stamp, viz., 10s. (since 1871), and the back-letter with a mortgage stamp corresponding to the amount intended to be secured. But the disposition may be stamped with the latter stamp, and the back-letter with the former.

While a security constituted by way of absolute disposition gives to the creditor many advantages, there are, at the same time, certain disadvantages which ought to be kept in view in entering into a transaction of this kind. The holder cannot poind the moveables on the ground for payment of his debt and interest. This is a diligence which is competent to a proper

heritable creditor only; but the creditor in a security constituted by absolute conveyance, being nominally proprietor of the subjects, loses the benefit of securing the moveables towards payment of his debt. Nor has the holder of an absolute conveyance all the privileges of a proprietor, where the real owner continues in possession of the subjects. He cannot sequestrate the furniture or other moveables in the premises as for rent, unless there be a contract of location between him and the party in possession. Although the holder of the *ex facie* absolute conveyance gives a lease to the real owner, it will not entitle the creditor to petition for sequestration of the moveables in the event of the nominal rent falling into arrear, because there is no real lease; *Heritable Securities Investment Association (Limited)* v. *Wingate & Co.'s Trustee*, 1880; 7 R. 1094. The proper remedy is an action of declarator and removal.

The opinion has been expressed by Lord Kinnear, in a case where an action was raised against the disponee concluding for implement of certain obligations alleged to be contained in his title, that the recording of the back-bond and the reconveyance of the subjects to the debtor and registration of the reconveyance operated a divestiture of the feudal title.

It may be proper in this place to advert to the effect of a security over machinery in public works, a species of security occasionally held by banks against advances.

An absolute disposition of public works, though purporting to convey in general terms all the machinery, heritable or moveable, will convey only the machinery so far as heritable. It is a difficult matter to say what is heritable and what is moveable machinery; and different rules have been applied in determining questions of this kind between heir and executor, landlord and tenant, and an heritable creditor and general body of creditors.

The general rule is, that machinery or fixtures built into the edifice, or so affixed to it that they cannot be removed without destruction or injury to the building, are heritable; and pass

with a conveyance of the lands. The application of this rule, however, is often a matter of great difficulty in determining what parts of the machinery are accessory to the building. A few illustrations of the rule may be given from the decisions of the Court. In the case of *Arkwright* v. *Billinge*, 3rd December, 1819, it was held that the security of an heritable bond covered not only the ground and buildings and great moving power or steam engine, but also the smaller machinery essential to the completeness of the mill. This decision, so far as regards the smaller machinery, was disclaimed by the Judges, and the question in a manner left open, in the case of *Niven* v. *Pitcairn*, 6th March, 1823, where an opinion was given that the case of Arkwright was decided, not because the machinery was heritable, but because the creditor had a real right in it. In *Niven's* case, it was found that large leaden vessels, not removeable from the premises without cutting them to pieces, were heritable, and, as such, fell under the security. In *M'Knight* v. *Irving*, 22nd June, 1805, a large counter, fixed by bolts to the floor, and shelves and drawers attached by wooden wedges to the walls of a shop, and a dresser, table, and shelves fixed in a kitchen in the same way, and chimney grates built into the fireplaces, were held not to be fixtures. In the case of *Dixon* v. *Fisher*, 6th March, 1843,* it was held that the machinery, and those parts which were attached directly, or indirectly by being joined to what was attached to the ground, although capable of being removed, either entire or after being taken to pieces, and also loose articles which, though not physically joined, were necessary for working the particular machinery, provided they were proper parts of it, and not susceptible of being applied in their existing state to other engines of the same kind, were heritable. This case, however, was one of succession, arising between the

* This case, in which the judgment of the Court of Session was affirmed by the House of Lords in 1845, after a review of both English and Scotch cases, is perhaps the most instructive and authoritative which we have, and was specially recognised as such in the case of *Dowall* v. *Miln* (1874 ; 1 R. 1180), in which the question lay between Executor and Heir.

heir and a younger child, who claimed *legitim*; and it is doubtful whether the same principles would be applied as between an heritable creditor and a trustee in bankruptcy. It was recently decided *in England* that power-looms were *heritable*.

The usual mode of constituting a security over moveable machinery in a mill or manufactory is as follows:—The creditor takes an absolute disposition to the heritage, containing an absolute assignation of the machinery, as specified in an inventory annexed; this last is generally followed by an instrument of possession; and the premises are thereupon let to the debtor by a regular lease, upon condition of his keeping them in good repair, and of paying annually to the creditor a certain sum in name of rent or hire. The rent ought to be regularly settled, as in an ordinary lease. The efficacy of a security over moveables thus constituted has been doubted by some lawyers, more particularly where the true owner remains in actual possession, with an implied power of disposal—there being no means of taking off the effect of reputed ownership by publication of the security; see page 121. It has been supposed that the Mercantile Law Amendment Act affords some facilities for constituting securities of this kind, but it does not appear to bear on the subject. Its provisions have reference, solely, to *bona fide* sales of moveables left in possession of the original owner, and not to securities taken by way of a covert sale; see page 126.

**2. Assignation of Incorporeal Rights.**—Incorporeal rights, such as bonds for borrowed money, life policies, shares in a public company, a vested interest in a succession, and the like, may be transferred as a general security for advances. This is done by an assignation, transferring the right to the creditor. The assignee's right is completed by intimation of the transference being made to the party holding the right or fund transferred. The date of intimation, and not the date of transfer, regulates questions of priority; *Campbell's Trustees* v. *Whyte*, 1884; 11 R. 1078. The transfer of moveable property has been

simplified by the "Transmission of Moveable Property (Scotland) Act, 1862,"* in the schedules to which there is given the form of an assignation of the right to be transferred. The Act also regulates the mode of intimation, which may be made in either of two ways. (1) By a notary delivering a copy of the assignation, or such parts of it as respects the subject assigned, certified as correct to the person to whom intimation is requisite, by leaving it at his dwelling-house in presence of two witnesses. Evidence of the intimation is preserved by a notarial certificate, indorsed on the assignation in the form prescribed by the Act. (2) By the holder of the assignation transmitting through the post a copy, certified as correct, to the party to whom intimation is to be made; and a letter acknowledging receipt of such copy is sufficient evidence of the intimation. The old modes of intimation, however, are not abolished: and the method generally adopted is, to hand to the holder of the right transferred a copy of the assignation, and get him to indorse on the principal an acknowledgment of intimation. The object of intimation is to impose on the debtor evidence of the transfer, and to stop him from paying to his original creditor. Intimation may be effected by other methods equivalent to intimation; as, for example, by the raising of an action in which the assignation is founded on, or by the production of it in a process, to which the debtor is a party; by the debtor's written engagement to pay to the assignee; or by intimation by letter to the debtor or his agent, with an answer; *Wallace* v. *Davies*, 1853; 15 D. 688. Payment of interest to the assignee is also equivalent to acknowledgment of intimation. When the debtor is a party to the deed, intimation is unnecessary.

Intimation to one of several debtors in a bond, and to a factor, where a memorandum was entered in the books of the principal, has been held sufficient. Intimation to the managers or clerks of a trading company, entered in the books of the company, is sufficient. Where one of several co-trustees manages

* The Policies of Assurance Act 1867, further simplifies the transmission of Life Policies.

the affairs of the trust, intimation to him alone is sufficient; *Jameson* v. *Sharp*, 1887; 14 R. 643. In the case of *Blake* v. *Douglas*, 1860; 23 D. 15, the terms of an assignation in security were held to prove the subsistence of a debt, even though the bills granted in respect of it had prescribed, there being no proof that the debt was paid.

The creditor in an assignation which bears to be in security of a special advance, is not entitled to hold the security against further advances. A decision on this point will be found in the case of *Forbes* v. *Robb*, 1858; 21 D. 79. In this case the creditor advanced £500 on the security of a life-policy for £1000. He afterwards advanced other £700, but the security was not extended to this further advance. In a question with the borrower's trustee, the creditor was found not entitled to retain the policy for the £700; see also the case of *Borthwick* v. *Scottish Widows Fund*, 1864; 2 Macph. 595.

**Loans on Railway and other Stocks.**—The stocks are conveyed absolutely to the bank, and the bank and the borrower execute a mutual obligation, usually of the nature of an agreement, explaining the terms of the loan, providing for depreciation in the value of the securities during its currency, granting power of sale to the lender, &c. This document, known as a mortgage of stock, requires to be stamped with a duty of 10s. for every £5000 or part of £5000 borrowed, see 34 Vict. c. 4. But no release or discharge of it is chargeable with any *ad valorem* duty. The mortgage of stock need not necessarily be of the form of an agreement. It may be framed so as to require execution by the debtor only. A form of the document in common use will be found in the Appendix.

**3. Transference of Corporeal Moveables.**—In the case of the sale of goods, the rights and liabilities of parties at common law, as modified by the Mercantile Law Amendment Act, 1856, are as follows:—The seller of the goods (notwithstanding the personal contract of sale) remains the

undivested owner of the goods, whether the price be paid or not, so long as the goods are not delivered. The property of the goods does not pass to the buyer, without delivery, actual or constructive. The buyer is debtor for payment of the price, and the seller is debtor to the buyer for delivery. The seller is entitled to retain the goods in security of payment of the price, if unpaid, unless he has sold the goods on credit, and, if the buyer become insolvent, or be *vergens ad inopiam*, he is entitled to retain, notwithstanding that the sale be on credit. On the other hand, the purchaser is entitled to enforce delivery, in terms of the contract of sale, and his right to do so is attachable by his creditors, while the seller's creditors, or his trustee, cannot attach such goods by any diligence, in competition with the purchaser or any one in his right. Whether the price has been paid or not, the seller is entitled to retain the goods, against the purchaser or his trustee in bankruptcy, in security of any balance due him by the purchaser on general account; but, on a sub-purchaser intimating his purchase to the seller, the seller is bound to make delivery to him on payment of the price, or performance of the obligations and conditions of the contract of sale. In the case of a sub-sale, the seller thus loses his right of retention for a general balance, if the price of the goods has been paid by the purchaser, or if the sub-purchaser pays the price or performs the other conditions of the contract. While the sub-sale remains unintimated, it may be defeated—(1) by intimation of another sub-sale of the same goods by the purchaser; (2) by arrestment, used at the instance of a creditor of the purchaser, in the hands of the seller; (3) by sequestration of the purchaser, when the right to demand delivery passes to his trustee; (4) arrestment or poinding at the instance of the seller, while the goods remain in his own hands or possession; see Mercantile Law Amendment Act, 1856, secs. 1, 2, 3; and *Wyper* v. *Harvey*, 1861; 23 D. 606. The documents requiring to be considered with reference to the transference of moveables, are bills of lading, delivery orders, and warrants for goods.

(1) *Bill of Lading.*—A bill of lading is an instrument under the hand of a ship-master, acknowledging that certain goods have been delivered to him on board his ship, and binding himself to deliver them at the port of destination to the consignor or his order; or to the consignee by name, or his assigns, according to arrangement. If the consignee's name be not mentioned in the bill, the consignor indorses his own name on the back, with an order to deliver it to a particular person, or he indorses it blank. In the case of a special indorsement, the ship-master is bound to deliver the goods to the party named, or to his order; and in the case of a blank indorsement, to the bearer of the bill of lading. The master is entitled to get delivery of the bill of lading in exchange for the goods.

A bill of lading is not a negotiable instrument, like a bill of exchange, but is assignable by indorsation, and passes such right, and no better, as the person assigning had in it. By the Bills of Lading Act, 18 & 19 Vict. c. 111, "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading *to whom the property in the goods therein mentioned shall pass, upon, or by reason of, such consignment or indorsation*, shall have transferred to, and vested in him, all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself;" see the case of *Craig & Rose* v. *Delargy*, 1879; 6 R. 1269. In this connection, however, it must be borne in mind that where the indorsee is merely a security-holder, the intention of the parties in the transference will be taken into account and this section will not apply; see *Tod & Son* v. *Merchant Banking Co. of London, &c.*, 1883; 10 R. 1009, where the bank, the indorsees, were held, by allowing delivery to take place, to have lost their security, the bargain being in reality between the indorser and the purchaser. The indorsation of it to an onerous and *bona fide* indorsee, by the consignee or by a factor, under the Factors Act, 5 & 6 Vict. c. 39, operates as a complete transfer of the property described in it, without any

intimation; see also 40 & 41 Vict. c. 39. Where the price is unpaid, and the purchaser becomes insolvent, the seller, in a question with the buyer's creditors, is entitled to stop the goods *in transitu*, and to retain them as a security for payment of the price. The right of stoppage *in transitu* subsists till the goods are *delivered* to the purchaser. But the seller has no right of stoppage *in transitu* where the bill of lading has been indorsed to a third party for an onerous consideration. The indorsation for value takes away the vendor's right, and the ship-master is bound to deliver the goods to an onerous holder on presentation of a bill of lading.

(2) *Delivery-Order.*—A Delivery-order (which requires a penny stamp duty) is an authority by the owner of the goods, addressed to the custodier of them, to give delivery to the party named in the note or his order. A delivery-order is transferable like a bill of lading. The indorsement of it will not, of itself, transfer the right of property in the goods to the indorsee or holder. The transfer requires to be intimated to the actual custodier of the goods, before any change in the ownership is held to have taken place. Delivery-orders frequently pass from hand to hand without intimation to the custodier of the goods, but it is quite well known in trade that a delivery-order does not pass by indorsation and delivery, as in the case of a bill of lading. Intimation of a delivery-order to the foreman of the sellers who has charge of their warehouse, does not operate constructive delivery of the goods to the purchaser, or assignee in security; *Anderson* v. *M'Call*, 1866; 4 Macph. 765. The original vendor of the goods, where the price has not been paid to him, has a right of retention so long as the goods stand in his name in the books of the warehouseman. This was solemnly decided by the House of Lords, affirming the decision of the Court of Session, in the case of *M'Ewen* v. *Smith*, 20th March, 1849 –(Ross's Leading Cases, vol. ii. p. 91). The circumstances of this case were shortly these: Smith & Co. sold to Bowie & Co. a quantity of sugar, and gave them an order on the custodier

of the goods to obtain delivery. Bowie & Co. granted bills to Smith & Co. for the price. Thereafter, Bowie & Co. sold the goods to M'Ewen, who paid them the price, and received the delivery-order indorsed, but did not intimate the transference to the warehouse-keeper. Bowie & Co. having failed before retiring the bills granted by them to Smith & Co. for the price, the latter took possession of the goods. A question then arose between M'Ewen, the last purchaser, and Smith & Co., as to who was entitled to the goods. M'Ewen claimed them on the ground that he had paid Bowie & Co. the price, and had received from them the original delivery-order duly indorsed. Smith & Co., on the other hand, maintained, that as the goods had never left their possession, and as they had not got payment of the price from Bowie & Co., they were entitled to retain the goods till they received payment of the price. To this plea the Court gave effect.

Where advances are made on the security of goods in a bonded warehouse, or in the custody of a middle-man, the delivery-order in favour of the creditor ought to be, *ex facie*, absolute and duly intimated to the custodier, and the goods transferred to the creditor's name. On this being done, the creditor is entitled to hold the goods, not only as a security for advances made at the time, but for subsequent advances. This was decided in the case of *Hamilton* v. *The Western Bank*, 1856; 9 D. 152. Here the bank discounted to Millar & Co. a bill for £630, 10s., on receiving from them an absolute order for delivery of certain brandy in a bonded store. In virtue of the delivery-order, the brandy was transferred to the bank in the warehouseman's books. The delivery-order was inclosed to the bank in a letter from Millar & Co. which stated that the brandy was to be held as a collateral security until retirement of the bill. The bill was renewed at maturity for £500, and a similar letter was addressed by Millar & Co. to the bank, stating that the brandy was to be held as a collateral security until the renewed bill was retired. This bill was duly paid by the acceptor at maturity. Shortly before this bill fell

due, Millar & Co. obtained a further accommodation of £400 from the bank, but no writing passed between the parties extending the security over the brandy to this last advance. Millar & Co. became bankrupt, the £400 being still due to the bank, and the brandy still standing in their name. In these circumstances, the trustee in Millar & Co.'s estate demanded restitution of the brandy from the bank, on the ground that it was only pledged for a *special* debt, which had been satisfied. The Court held that the contract was not one of pledge, but that, the transference being absolute, the bank was entitled to hold the goods in security of all their advance.

(3) *Warrants for Goods.*—Warrants for goods, which require a stamp duty of threepence, are issued by public warehouse-keepers, and are documents of title which represent the goods, and are transferable by indorsation. It is, however, advisable for the holder to intimate the transference to the warehouse-keeper. As regards the effect of iron warrants, see *Bovill* v. *Dixon*, 21st February, 1854, and in the House of Lords, 1856; 19 D. (H.L.) 9; also *Merchant Banking Company of London* v. *Phœnix Bessemer Steel Company*, 5 Law Reports, Chancery Division, 205.

**4. Pledge.**—The contract of pledge is frequently resorted to in trade for the purpose of obtaining advances of money. It is constituted by delivering to the party making the advance, a moveable subject, or the vouchers of a debt, to be held by the creditor until the advance is repaid. Pledge does not, like an absolute transference of moveables, confer a right of property in the subject impignorated. It is an inferior right to that of property. It does not imply a power of sale by the creditor; and, accordingly, if he fails to recover payment of the advance, he can sell the subject pledged only by judicial authority.

The foundation of pledge is actual custody or possession of

the subject by the creditor, without which there can be no complete pledge.

It frequently occurs in trade, that a merchant obtains an advance against goods placed in a warehouse belonging to himself, by delivering to the party making the advance the key of the warehouse. Delivery of the key of a warehouse was held by the House of Lords to be actual delivery of the goods in the warehouse in *Maxwell & Co.* v. *Stevenson*, 1831 ; 5 W.S. 269. This was the case of a sale ; but there seems no reason to doubt that the same principle would apply to the case of pledge. In an old case, *More* v. *Dudgeon & Brodie*, 3rd July, 1801, the Court held that, where the key of a warehouse was truly delivered, the circumstance of the sellers having it in their power, by an open compartment over a communication door, to get access to the loft, and bar the door to the exclusion of the buyers, could have no effect in destroying the reality of the delivery and possession.

The terms of the contract of pledge are generally established by writing. If the goods are pledged for a specific debt, they can be held only as a security for that debt ; and the creditor, in a question with a trustee in bankruptcy, would be bound to restore the goods on receiving payment of that debt, even though he has made further advances to the pledger ; see the opinions of the Judges in the case of *Hamilton* v. *The Western Bank*, 1856 ; 9 D. 152. When, therefore, further advances are to be made after a specific pledge has been constituted, the pledge should be extended to the further advance, or made applicable to the general obligations of the pledger. In an English case, *Jones* v. *Peppercorn*, 3rd December, 1858, where certain bonds, payable to bearer, were deposited with a money-lender, in security of a specific advance, which when sold by him yielded more than the specific advance, it was held by the Vice-Chancellor that the broker had a lien over the surplus for his general balance. In the *Royal Bank of Scotland* v. *Saunders & Son's Trustees*, 1882 ; 9 R. (H.L.) 67, it was held that where the acceptor of bills holds goods in pledge against these bills,

his trustee in bankruptcy is entitled, the drawer being also bankrupt, to apply the proceeds of the goods towards relieving the acceptor's estate of all payments made out of it to the holder of the bills.

**5. Deposit of Titles and other Securities.**—Title-deeds, bonds, and the like securities are sometimes deposited with a lender in security of advances, but such a deposit gives the lender no security, except in the case of negotiable securities payable to bearer. Under the Companies Acts, 1862 to 1890, calls already made, though the time of payment has not yet come, may be validly assigned, where the company possesses an express power to mortgage calls, and perhaps where the company is compelled suddenly to borrow money for a temporary purpose, though possessing no express power to borrow or mortgage. In the recent English case of *in re Pyle Works*, 1890, Law Reports, 44 Ch. Div. 534, it was held that there is nothing in the Companies Acts prohibiting a limited company from mortgaging its unpaid-up capital; consequently, where power to mortgage such capital is given by the articles of association, a mortgage by the company of uncalled capital is valid, even as against creditors in a winding-up, the calls in a winding-up being part of the "assets" or "capital" of the company.

## CHAPTER XII.

### BANKER'S LIEN, COMPENSATION, NOVATION.

**Retention or Lien** is a right to retain the property of another till a debt due by the proprietor to the custodier is paid, or as a security for a general balance arising in account between the parties. Lien is of two kinds, special and general. Special lien is founded on a mutual contract, which enables one to retain possession of a subject belonging to the other till the counterpart of the contract be fulfilled. Such contract may either be express, or implied from a particular course of dealing between the parties, or from the usage of trade. General lien is competent to factors or agents only. It extends beyond the limits of the particular contract in respect of which possession of the subject may have been obtained, and gives the factor or agent a right of lien over goods or money obligations in his possession, belonging to the principal, for the general balance arising on account between them.

The commerce of the country being so largely carried on by means of agents, the Courts of law have always been disposed to favour the agent's right to a general lien over all the goods of the principal in his possession. The ground on which lien is so favoured is, that an agent is very readily induced to interpose his credit on behalf of the principal on the faith of his being able to indemnify himself from the property of the principal, which may be, or may afterwards come to be in his possession; and that it is for the advantage of trade that agents should have a right of lien for obligations undertaken by them on account of the principal.

*Possession* is an essential requisite of lien, and the right endures only so long as possession continues. If, therefore, the

factor or agent parts with the possession of the property of his principal, he parts with his right of lien at the same time. But the lien will revive on the property being restored to the possession of the agent. It is, however, to be observed, that the possession must have been obtained in a fair and legitimate way. If it has been obtained improperly or accidentally, the right of lien will not hold.

Bankers, being money-agents, have a general lien over all monies and paper securities in their hands belonging to their customers, for payment of the general balance due on account between them, unless such monies or securities have been deposited with the banker for *a specific purpose*. The rule as to banker's lien is thus laid down by an eminent English Judge: "It is very proper that there should be a known rule to govern the conduct of all persons whose dealings with bankers are very extensive; and that rule is, that no person can take any paper securities out of the hands of his banker without paying him his general balance, unless such securities were delivered under a particular agreement which enables him to do so." In accordance with this rule, a banker has no lien over bills sent to him for the special purpose of negotiation, or bills left with him for discount, for which he refuses to give money. Nor has he a general lien over bills specially appropriated. For example, if, by special arrangement, a bill is indorsed in security of another bill, which has been discounted, and the banker obtains payment of the discounted bill, he cannot retain the security-bill for his general balance, but is bound to restore it to the customer, under the special agreement. But if bills in the ordinary course of business are indorsed to a banker in security without being specially appropriated to a particular debt, he has a lien over such bills for his general balance. But a banker has no lien over his customer's plate-chest, which has been deposited with him for safe custody, or securities left in his hands by mistake.

In determining questions of lien, it is important to mark the distinction between discounted bills and bills deposited in

security of advances. In discounting a bill the banker either pays to the holder the sum contained in it, under deduction of interest to the date at which it became payable, or he carries the amount, less discount, to the credit of the holder's operative account. The banker in this way becomes purchaser and proprietor of the bill; and, consequently, it is not subject to the right of lien. With regard to bills indorsed in security of advances, the banker has no right of property in them, but only the lesser right of lien over them. The customer is entitled to redeem such security bills by repaying to the banker the amount of his advances. The indorsation to the banker, however, entitles him to receive and demand payment of a security-bill from the parties bound by it. It is a settled point, that if a banker accepts bills for the convenience of his customer, on an agreement that he should receive a remittance in time to meet them, and the customer sends bills, the banker will have a general lien over such bills, as being unappropriated. It is also settled, that where a banker makes advances against bills lodged with him, and afterwards discounts certain of the bills, his lien over the remainder will subsist, even to the effect of securing him against loss in the discounted bills.

The purpose for which a bill has been indorsed to a banker can be proved by his writ or oath only, and not by parole evidence; *Glen* v. *The National Bank*, 1849; 12 D. 353. In this case a party averred that a bill was placed with the bank for discount, and not as a security-bill. It was held incompetent for him to prove this except by the writ or oath of the banker.

A banker is entitled, on the bankruptcy of his customer, to retain, in security of discounted bills current, any sums that may be at the credit of the bankrupt's account; *Ferrier* v. *British Linen Company*, 20th November, 1807; but he may not retain for his own security where the debt is not yet due, as in the case of a bill not yet arrived at maturity, unless either the acceptor or the drawer of the bill is bankrupt or insolvent or *vergens ad inopiam*; *Paul & Thain* v. *Royal Bank*, 1869; 7 Macph. 361.

**Compensation.**—Compensation, or, as it is called in England, "set off," operates to the effect of extinguishing two mutual debts, where the same parties are debtor and creditor to each other. Where the debts are not equal in amount, they are extinguished so far as there is a concourse of debit and credit, so that the debtor in the larger sum becomes debtor only in the balance. Where pleaded, compensation operates backwards, and stops interest from the period of concourse.

The rules upon which compensation is founded are:—1. The debts must be of the same nature and description. An obligation to deliver goods cannot be set off against a pecuniary obligation. But the mere fact of security being held for one of the debts will not prevent compensation being pleaded. 2. The parties must be mutually creditors of one another in their own right. Thus a bank-agent due a debt in his private capacity, cannot plead compensation of that debt by a debt due to the bank he represents. A debt due by a company may be compensated by a debt due to a partner, but a debt due to a company cannot be compensated by a debt due by a partner to the creditor of the company. When, however, the company is dissolved, the debts due to the company become the property of the partners, and compensation may be pleaded. 3. Both the debts must be due at the same time, or at all events when compensation is pleaded. A party cannot set off a debt, the term of payment of which has not arrived, against a debt presently owing and prestable. A person cannot set off a debt incurred by him subsequently to the bankruptcy against a debt due to him by the bankrupt incurred prior to bankruptcy; *Taylor's Trustees* v. *Paul*, 1888: 15 R. 740. 4. Both debts must be liquid—that is, capable of being instantly verified by writ or oath. If one of the debts be conditional, such as an unconstituted claim of damages, compensation cannot be pleaded against a debt for which the other party holds a written obligation. But if one of the debts be liquidated and the other due as an open account, the Court would, on grounds of equity, delay sentence till the creditor in the illiquid debt constituted his claim, if it was

capable of being constituted within a reasonable time. Where both claims are illiquid, they must be ascertained by separate actions, which are generally conjoined by the Court. (On this see *M'Farlane* v. *Robb*, 1870; 9 Macph. 370, as very instructive.)

Compensation of a debt due by the drawer of a bill to the acceptor cannot be pleaded against an onerous indorsee. Compensation may be pleaded not only by the principal debtor, but by a cautioner or any one having an interest in extinguishing the other debt, but it may not be pleaded on a debt obtained *mala fide* with the purpose of acquiring an undue advantage.

Compensation does not extinguish mutual debts *ipso jure*, but can only be pleaded in defence of a suit by one of the parties against the other. It does not stop the long prescription; so that a debt which has been allowed to prescribe cannot be set off against a debt which has not prescribed, even if the debts concurred before the prescription had run. The short prescriptions do not exclude the plea where the debt can be instantly instructed by the writ or oath of the party against whom it is pleaded.

In the case of bankruptcy the ordinary doctrine of compensation has been extended into something very similar to retention so as to admit of any kind of claim, future, contingent, or disputed, being set off against a liquid and certain debt due to the bankrupt. The debts must have concurred, and the party pleading compensation must have acquired his debt prior to the date of bankruptcy. An exception to this is illustrated by *Hanny & Sons' Trustees* v. *Armstrong Brothers*, 4 R. (H.L.) 43, where Lord Blackburn says: "It has for many years been decided, both in England and Scotland, that if the indorser become a party to the bill before the bankruptcy in the one country, or the sequestration in the other, he may set it off on becoming the holder afterwards." The date of bankruptcy as affecting the concourse of debts is fixed by the first deliverance in a sequestration, or by decree of *cessio*. (See Goudy on Bankruptcy, 538, *et seq.*)

**Novation.**—Novation is the substitution of a new obligation by a debtor to his creditor, the effect of which is to extinguish the old obligation and make the debt rest upon the new. It is very important that bankers should keep the effect of this principle in view where they hold guarantees or securities for debts. For example, if a party guarantees payment of a bill, and that bill is paid off by a renewal, the cautioner will not be liable for the renewed bill, because the obligation which he guaranteed has been extinguished. Again, where a bill is secured by a bond over a house, and the bill is renewed, the bond will be held as discharged by payment of the original bill; on the principle that, when once the debt represented by a bond is paid up, the bond cannot be made available for another advance. It may be laid down as a general rule, that cautioners for a debt, and securities other than those constituted by absolute conveyance or transfer, will be freed if the debt is made to rest upon a new obligation, to which the suretyship has not been extended.

## CHAPTER XIII.

### DISCHARGE AND PRESCRIPTION.

The general rule of law with regard to the extinction of debts is, that those constituted by a written obligation must be discharged in writing. It has been held that the debtor in a bond was not entitled to prove payment of it by parole evidence. Payments of money above £8, 6s. 8d. are not provable by parole evidence, except in the case of ready money transactions, "where payment of the price is the counterpart, and the immediate counterpart of the delivery, at the same time, of the subject sold;" *Shaw* v. *Wright*, 1877; 5 R. 245. There is another exception in the case of bills. By the Bills of Exchange Act, 1882, sec. 100, in any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence.

The discharge is an instrument of the simplest form. It is quite sufficient if the document acknowledges or clearly expresses payment of the debt.

**Of Payment.**—The creditor is bound to take payment from the debtor, or from any one acting for him, or from any one interested in the debt, such as a surety. He is not bound, however, to take payment of a partial sum. If payment is made by a surety, the creditor is bound to give him an assignation to enable him to operate his relief. But the creditor is not bound to assign the debt to a stranger paying it, except when he pays at the request of the debtor. Where there is no evidence to the contrary, payment is always presumed to have been made by the proper debtor, or with his money. Thus, a bill marked

"paid," is presumed to have been paid by the acceptor, and not by the drawer or indorser.

Payment may be made to the creditor or to any one authorised by him to receive it, such as a factor or agent. Payment will also be good, when made in *bona fide* to a person whom the creditor has led the debtor to believe had authority to receive it. It has been held that payment made to a creditor after sequestration of his estates was good, the debtor not being aware of the sequestration; also, that payment by a debtor at a distance from home, after an arrestment was used at his dwelling-house, was good—he being ignorant of the arrestment.

Where a party is owing separate debts to the same creditor, the creditor is entitled to apply an indefinite payment to the worst secured debt, if he chooses. But, on the other hand, the debtor, at the time of making payment, is entitled to appropriate it to any particular debt. In the case of pupils, the discharge of the father, as administrator-in-law, will be sufficient —see *Dumbreck* v. *Stevenson*, Court of Session, 18th February, 1856; House of Lords, 1861; 23 D. (H.L.) 1, where a discharge by a father of a legacy to his pupil son was sustained. A minor *pubes* must grant the discharge along with his father as his curator.

**Implied Discharge.**—Payment of a debt is presumed if the obligation is found in the possession of the debtor; but this presumption may be rebutted by proof that the debtor acquired the possession in an accidental or illegal manner. Termly payments, such as rents, interests, feu-duties, &c., due prior to the time for which the creditor has granted to the debtor three consecutive discharges for termly payments, are presumed to have been paid; but the presumption may be rebutted by reference to the debtor's oath.

We have already seen that debts may be discharged by compensation and novation. They may also be discharged by *confusion*—that is, when the same person becomes both debtor

and creditor in the obligation ; and by *delegation*—which means the substitution of a new debtor for the old, with consent of the creditor.

**Prescription.**—It remains to be noticed, that debts and obligations are extinguished by prescription, which is a legal presumption of payment or abandonment of the debt. The period within which debts prescribe varies according to the nature of the debt or obligation.

**Triennial Prescription.**—All debts not founded on written obligations, arising out of a course of dealing or service, prescribe in three years. The triennial prescription applies to merchants' and law agents' accounts, salaries, furnishings to a domestic establishment, house rents where the lease is verbal, wages to workmen and servants, &c. But it does not apply to the price of goods sold on commission ; nor to money received by an agent for his constituent ; nor to cash advances ; nor to contracts for repairs (Act 1579, c. 83).

Prescription begins to run from the date at which the debt or termly payment became due. In the case of a continuous account, it runs from the date of the last item in it. The whole of the account is saved from prescription if the last item is within three years, and there is no blank for three years in the continuity of the account.

After the lapse of the years of prescription, the creditor can only prove the subsistence of the debt by the writ or oath of the debtor. With regard to the writ of the debtor, it must be dated after the lapse of the years of prescription, and not within them. It must also distinctly identify the debt in question. If the debt is referred to the debtor's oath, and he swears that he paid it, or gave money to his wife, son, or manager to do so, the claim will be lost.

Prescription will be interrupted by bringing and executing an action at any time within the three years. If the debt is constituted by bill or other written obligation, it will be taken out of the triennial prescription.

**Quinqennial Prescription.**—The Act 1669, c. 9, anent Prescriptions, enacts that "all bargains concerning moveables or sums of money, provable by witnesses, shall only be provable by writ or oath of party, if the same be not pursued for within five years after making the bargain." Rents, minister's stipend, contracts of sale, hiring, loan, deposit and pledge of moveables fall within the quinquennial prescription.

**Sexennial Prescription.**—This prescription is solely applicable to bills and promissory-notes; and the effect of it has been considered in treating of these instruments.

**Septennial Prescription.**—The septennial prescription applies to cautionary obligations; and has already been explained under that head.

**Vicennial Prescription.**—By the Act 1669, c. 9, holograph writings, such as bonds not attested by witnesses, missives, and books of account, &c., prescribe in twenty years. The vicennial prescription has reference, not to the *subsistence*, but to the *constitution* of the debt. It will be observed that the debt rests upon a written obligation, holograph of the debtor, but not tested. Had it been tested, the debt would have endured for forty years. The reference to the oath of the debtor in such questions, therefore, is—whether the signature is his or not? If he admits the signature to be his, he will be liable in the debt, even though he should swear that he had paid it.

**Negative or Long Prescription.**—All moveable and heritable bonds, rights, contracts, and obligations whatever, prescribe in forty years,* and are of no avail if the creditor does not take document thereupon, or pursue for the same within that space. The prescription commences to run from the term

* By the Conveyancing Act, 1874, the positive prescription (forty years) is reduced to twenty years.

of payment, and not from the date of the obligation. The years of minority and of incapacity of the creditor do not count in reckoning the years of prescription.

Prescription may be interrupted either judicially or extra-judicially. Judicial interruption is by bringing an action into Court, or doing diligence on the obligation, before the lapse of the forty years. Extra-judicial interruption is by taking a new obligation for the debt, or a bond of corroboration, or an engagement to pay interest.

The effect of the long prescription is to extinguish the debt entirely. It does not, like the shorter prescriptions, permit of a reference to the oath of the debtor; and the only pleas that can be put forward in answer are—interruption, minority, and *non valens agere*.

## CHAPTER XIV.

### OF DILIGENCE.

**1. Arrestment.**—The diligence of arrestment is used for the purpose of attaching moveables or money belonging to a debtor in the hands of a third person, or debts due to him. The effect of the arrestment is to prohibit the person in whose hands it is used from paying or delivering the money or moveables to the person against whom the diligence is directed, until the debt be satisfied or paid. The party at whose instance the diligence proceeds is called the arrester; the person in whose hands it is used is called the arrestee; and the person to whom the fund arrested belongs is termed the common debtor.

Arrestment is of two kinds—*arrestment in security*, and *arrestment in execution*.

*Arrestment in Security.*—The diligence is so termed where the arrester's debt is illiquid, and for constituting which there is an action in dependence, or where the debt is not yet payable. The warrant to arrest in security may be either in the summons or in letters of arrestment, or in a precept from an inferior Court. The terms of the warrant are, that the fund shall "remain under sure fence and arrestment until sufficient caution be found that the same shall be made forthcoming to the complainer, as accords of law." Where the arrestment is used on a summons, it must be executed within twenty days of the date of the arrestment, and brought into Court within twenty days of the diet of compearance, or on the first sederunt day after, if in vacation; otherwise the arrestment will fall. On the debt being constituted by decree of the Court, the arrester will then be in a position to bring an action of forthcoming against the arrestee.

*Arrestment in Execution* proceeds upon a warrant on a *decree* of the Court against the common debtor; or on letters of horning; or upon an extract of a liquid document of debt, such as a bond or bill, recorded for execution in the Books of Council and Session, or of an inferior Court. The fund remains arrested "aye and until the complainer shall be fully satisfied and paid."

The Court of Session will loose an arrestment on caution being found that the funds will be made forthcoming to the arrester; and where a larger sum is arrested than what is due to the arrester, the Court will restrict the diligence. If the arrestment is used oppressively and improperly, the Court will recall it on cause shown; and the party using it may be subjected in damages. The mention of a specific sum in the schedule of arrestment, with the words, "less or more," does not constitute a limitation. So an arrestment "for £50, less or more" was held to cover the whole expense of the action, which brought the claim much beyond £50; *Ritchie* v. *Maclachlan*, 1870; 8 Macph. 815.

**Furthcoming**.—The furthcoming is an action raised by the arrester against the arrestee and the common debtor, for the purpose of ascertaining the amount of property in the hands of the arrestee, and of making it available for payment of the arrester's claim. The arrestee has no interest in the justice or accuracy of the claim of the arrester. It is the business of the common debtor to look after this, and for this purpose he is made a party to the action. The arrestee, if he has any property in his possession belonging to the common debtor, is bound to give up a correct statement of it; and if he does not do so, all the channels of evidence will be open to the arrester to prove the amount of property held by the arrestee. The only defences competent to the arrestee are, that he has no funds; or that he has a lien over them; or that the arrestment is informal. It is important for arrestees to keep in view, that if the arrestment is informal, payment under a decree of furth-

coming will not save them from a demand at the instance of the original creditor; and, in such a case, they may have to pay a second time. If the fund arrested be a debt, decree of furthcoming will go out for the amount thereof, or for so much of it as will pay the arrester's claim. If the property arrested be goods, the arrestee will be ordained to deliver them up for sale, as in a poinding, the proceeds to be paid to the arrester.

**Effect of Arrestment.**—The general rule is, that the debtor's property in the possession of the arrestee at the date of the arrestment is attached; but funds or goods coming into the possession of the arrestee, after the arrestment has been used, will not be attached. For example, if an arrestment is used in the hands of a banker against a customer who has no funds at his credit at the time, but who pays in money the day after, such money would not be attached by the arrestment. In the case of rents or interests payable half-yearly, an arrestment used on the term-day will only attach what is due for the previous half-year, and will not attach the half-year's payment to become due at the subsequent term. An arrestment used betwixt terms will attach the current half-year's rent or interest.

Alimentary funds, pensions, and judges' salaries, are not arrestable; nor are workmen's wages, except in so far as they exceed 20s. a-week, 33 & 34 Vict. c. 63. An exception to this holds in the case of arrestments used on decrees for alimentary allowances, and for rates and taxes imposed by law.

Arrestments are preferable according to the date at which they are used.

Arrestment in security covers the interest of the debt and the expense of the action, but not the cost of the arrestment itself.

**Prescription of Arrestment.**—By the Personal Diligence Act, arrestments in execution prescribe in three years from their dates; and arrestments used on the *dependence* of an action prescribe in three years from the date of the debt being con-

stituted by decree. Arrestments of sums not exceeding £12 sterling prescribe in three months, unless a furthcoming or a multiplepoinding be brought.

**2. Poinding.**—By the diligence of poinding, a debtor's moveables may be attached for payment of his debts. Under the Personal Diligence Act, 1838, all decrees of the Court, and extracts of liquid documents of debt recorded for execution, contain a warrant to charge for payment under the pain of poinding and imprisonment; and on expiry of the days of charge, the debtor's moveable effects may, under the decree, be poinded for payment of the principal sum and interest, and for so much as will cover the expense of the diligence. Goods in which the debtor has only a joint-interest, or in which he is life-rented, cannot be poinded. Nor can plough goods and implements of husbandry be poinded during the season of labouring, if the debtor has other goods to be poinded. In *Lochhead* v. *Graham*, 1883; 11 R. 201, it was held, that it is competent for a creditor to poind goods of his debtor in the creditor's own possession.

The form of procedure is as follows:—A messenger-at-arms, accompanied by two persons to act as valuators, and who may also act as witnesses to the poinding, proceeds to the place where the debtor's effects are situated, and, after reading the warrant and crying three oyesses, makes a schedule of the goods poinded, and of the value put upon each article by the valuators, to whom the messenger administers an oath. The poinded goods are then offered back to the debtor at the values put upon them, and if he, or any one in his name, tenders the value, the poinding must be stopped. The poinded effects are left on the ground, and a schedule is delivered to the possessor specifying the articles, the value, and the name of the poinder. The officer must then, within eight days, report the execution of the poinding to the Sheriff, in due form; and, upon this being done, the Sheriff grants warrant of sale by public roup, to take place at the sight of a judge, not sooner than eight, and not later than

twenty days after publication of the notice of sale. Six days' notice of the sale must be given, by serving a copy of the warrant upon the debtor or other possessor of the goods. Such notice may be by registered letter, where the debtor is resident out of the jurisdiction of the Sheriff who granted the order; *Lochhead* v. *Graham*, *supra*. The upset price must not be less than the appraised value; and, if no offerer appears, the judge of the roup delivers to the poinder as much of the goods poinded as will, at the value put on them, pay the debt, interest, and expenses. If the goods are sold, the judge must report the sale to the Sheriff within eight days, and lodge with the clerk the roup-roll and an account of the proceeds and expenses. The Sheriff then orders the poinder's debt to be paid out of the proceeds.

Any other creditor in possession of a warrant to poind may have his diligence conjoined with that of the poinding creditor, by producing the warrant to the messenger before the poinding is completed, so as to participate in the fund made available under the diligence.

Where a creditor finds that another has got the start of him in carrying through a poinding of a debtor's effects, the preference may be cut down in either of three ways. (1) By rendering the debtor notour bankrupt, in terms of the Bankruptcy (Scotland) Act, 1856. The 12th section enacts that all "arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date." This section also declares that a poinding creditor who has carried through a sale, and an arresting creditor who has obtained a decree of furthcoming, shall be liable to an action at the instance of any other creditor producing liquid grounds of debt or decree of payment within the sixty days, for a proportion of the sum recovered; see *Gallacher* v. *Ballantine*, 1876; 13 S.L.R. 496. (2) Sequestration under the Bankruptcy Act renders ineffectual arrestments or poindings executed on or after the sixtieth day prior to the sequestration;

and the trustee is entitled to demand from creditors who may have obtained payment, the funds recovered by them, under deduction of the expenses *bona fide* incurred by them. (3) By the Companies Act, 1886, sec. 3, the winding up of any company under the Companies Acts, 1862 to 1886, is, in the case of a winding up by the Court, as at the commencement thereof, and in the case of a winding up subject to the supervision of the Court, as at the date of the presentation of the petition, on which a supervision order is afterwards pronounced, equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding; and no arrestment or poinding of the funds or effects of the company, executed on or after the sixtieth day prior to the commencement of the winding up by the Court, or to the presentation of the petition on which a supervision order is made, as the case may be, is effectual.

For Crown debts, the debtor's whole moveable effects, without exception, may be poinded, and the goods so poinded shall remain in the custody of the officer poinding them till sold by him, 43 & 44 Vict. cap. 19, sec. 97.

## DILIGENCE AFFECTING HERITABLE RIGHTS.

**1. Inhibition.**—The diligence of inhibition is used to prevent a debtor, possessed of heritages, from selling or alienating them to the prejudice of the creditor inhibiting. It does not affect property acquired after the diligence is executed, with the exception of land to which the debtor succeeds under a deed of entail or other indefeasible title.

Inhibition may proceed either upon a liquid document of debt, or upon the dependence of a summons raised for constituting a debt. It is incompetent where the summons does not have pecuniary conclusions other than for expenses; *Burns* v. *Burns*, 1879; 7 R. 355. Inhibition may be used to secure a debt not yet due, where the debtor is *vergens ad inopiam*.

A *Notice of Inhibition* can be registered; and if followed by

the inhibition and execution thereof, duly registered, within twenty-one days of the notice, the inhibition takes effect from the date of the notice; Titles to Land Consolidation Ac 1868, sec. 155.

The letters of inhibition direct the messenger to charge the debtor not to sell, alienate, or burden his property to the prejudice of the creditor, and to charge the lieges not to purchase the debtor's heritages, nor receive from him any deed of alienation. The inhibition is executed against the debtor personally, or at his dwelling-place, and if he is furth of Scotland, the writ is executed against him at the Edictal Office within the Register House, Edinburgh. The inhibition, with executions, must be registered within forty days in the General Register of Inhibitions.

The effect of the diligence is merely prohibitory, and gives no active right or security. For this purpose the creditor must use the diligence of adjudication.

Inhibitions prescribe in five years, but they can be registered anew.

If the debtor whose property is under inhibition be sequestrated, the trustee can sell, but the inhibition will receive effect as a preference in the rankings.

**2. Adjudication.**—By this diligence the debtor's heritable estate may be transferrrd to his creditor, in payment of a debt constituted by decree or by a liquid obligation.

Adjudication is effected by a summons raised at the instance of the creditor against the debtor, concluding to have his heritages adjudged to the creditor in payment of the debt. After decree is obtained, the creditor's right must be published, either by recording an abbreviate in the Register of Abbreviates of Adjudications within sixty days, or by the creditor obtaining himself infeft or registered. The decree following thereon is a warrant for infefting the adjudger in the property, and his title may be completed by recording it in the Register of Sasines.

The right acquired by the adjudger is not absolute. The

subjects may be redeemed by the debtor at any time within ten years, the period of the legal reversion. The adjudger's right becomes irredeemable upon his obtaining a decree of the Court declaring the legal expired, or by possession upon a charter and sasine for forty years from the expiry of the legal (*i.e.*, the expiry of the period within which the subjects are redeemable).

Although the term of payment of a debt is not come, or the debt be contingent, the Court of Session, *ex nobili officio*, will allow the creditor to lead an adjudication in security, where the debtor is *vergens ad inopiam*, or the creditor is in danger of losing his debt by other creditors adjudging within year and day. This adjudication subsists merely as a security, and has no legal term for redemption, and can never form a title to the property.

It has been held competent to adjudge a trust-estate for expenses decerned for, against the trustees in a litigation in which the trust-estate was alone concerned.

**3. Poinding of the Ground.**—This diligence is competent to real or heritable creditors only. It is not competent to creditors in possession; or to proprietors, except to superiors for their feu-duties. Where the superior has divested himself of his superiority, he cannot poind for recovery of arrears of feu-duties due prior to his divestiture; *Scottish Heritages Co.* v. *North British Property Investment Co.*, 1885; 12 R. 550.

The diligence attaches all moveables found on the ground of the subjects over which the security extends, except those belonging to strangers. Tenant's moveables, to the value of the current term's rent, may be attached by it. The poinding creditor obtains no preference over moveables which have been removed prior to the petition, although the removal may have been wrongful; *Urquhart* v. *Macleod's Trustees*, 1883; 10 R. 991; nor over goods which are *bona fide* the property of a third party; *Thomson* v. *Scoular*, 1882; 9 R. 430. Immediately the summons of poinding the ground is served, the

heritable proprietor is interpelled from allowing others to acquire rights over the moveables on the subjects poinded; *Lyons* v. *Anderson, &c.*, 1880; 8 R. 24.

It is competent to poind in security for interest current but not yet due, but payment cannot be demanded till the stipulated term arrives; *Stewart* v. *Gibson's Trustees*, 1880; 8 R. 270.

The diligence is obtained in the Court of Session by raising a summons against the proprietor, narrating the heritable bond or other ground of debt, and concluding that letters should be directed to messengers-at-arms, charging them to search for and poind the defender's moveables, and those of the tenant to the extent of the rent for the current term. Letters of poinding the ground are then obtained upon the decree.

Under this diligence heritable creditors may obtain a preference to all the moveables on the ground belonging to the debtor. The effect of this diligence in competition with sequestration has varied considerably under different statutes. As the law now stands (see Conveyancing Act, 1874, sec. 55, and Amendment Act, 1879, secs. 3 and 4), no poinding of the ground, which has not been carried into execution, by sale of the effects, sixty days before the date of the sequestration, is available in any question with the trustee; but a creditor, having a security preferable to the right of the trustee, may poind after the sequestration, but only to the effect of recovering the interest on the debt for the current half-year, and one year's arrears. The Companies Act, 1886, sec. 3, extends this provision to the case of the winding up of a company, and 50 & 51 Vict. c. 69, sec. 2, makes it applicable to all poindings of the ground by which moveables forming part of, or belonging to a bankrupt estate, whether administered in Scotland or furth thereof, are sought to be attached or affected, and that whether the debts or securities, in respect of which such poindings are brought, are constituted or granted by the bankrupt, or by his ancestor or predecessor, or by any other person.

As formerly stated, this diligence is not available to a creditor whose security is constituted by an absolute conveyance, with back-letter, he being *ex facie* proprietor of the subjects.

A creditor may use simultaneously all the available forms of diligence for the recovery of the same debt.

# CHAPTER XV.

## OF NOTOUR BANKRUPTCY, INSOLVENCY, AND PREFERENCES TO CREDITORS.

### I. *Notour Bankruptcy.*

It has always been the aim of the Courts of Law to prevent fraudulent alienations of their property by insolvent debtors to conjunct and confident persons, as well as to prevent unfair preferences being given to favourite creditors by debtors on the eve of bankruptcy. It was, however, no easy matter, at common law, to detect and expose the many complicated frauds which were found to be carried on by unprincipled bankrupts. The Parliament of Scotland, by their Act of 1621, c. 18, interposed a partial remedy for the evils then existing connected with insolvency. The Legislature, on the reports of the Lords of Session that the "fraude, malice, and falsehood of a number of dyvours and bankrupts is become so frequent and avowed, and hath already taken such progresse, to the overthrow of many honest men's fortunes and estates, that it is likely to dissolve trust, commerce, and faithful dealings amongst subjects," passed that statute, to enable the creditors of an insolvent to reduce gratuitous alienations of his property to conjunct and confident persons, made while he knew himself to be bankrupt. This statutory remedy, however, proved to be insufficient for checking the evils referred to, in consequence of the Act not giving any definite description of bankruptcy, and of its not fixing the date to which the retrospective effect of it should be carried. Accordingly, a further remedy was interposed by the Act of the Scottish Parliament, 1696, c. 5. This Act contained

a definition of notour bankruptcy, or public insolvency, and fixed sixty days as the period to which notour bankruptcy should have retrospective effect as regards preferences to creditors. In the case of *Teenan's Trustees* v. *Teenan*, 1886; 13 R. 833, it was held that insolvency in the sense of the Act, 1696, c. 5, was commercial insolvency or inability to meet current obligations when they became due, although the debtor's assets might be sufficient for the ultimate payment of his debts. The proofs of notour bankruptcy were enlarged by the subsequent Bankrupt Acts, and are now regulated by the Bankruptcy (Scotland) Act, 1856. See also the Debtors (Scotland) Act, 1880.

The 7th section of the Bankruptcy Act enacts that notour bankruptcy shall be constituted by the following circumstances:—

1*st*, By Sequestration; or by the issuing of an adjudication of bankruptcy in England or Ireland.

2*nd*, By Insolvency; concurring (1) with a duly executed charge for payment; followed, where imprisonment is competent, by imprisonment or formal and regular apprehension of the debtor; or by his flight or absconding from diligence, or retreat to the Sanctuary, or forcible defending of his person against diligence; or, where imprisonment is incompetent or impossible, by execution of arrestment of any of the debtor's effects, not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security; or (2) with sale of any effects belonging to the debtor under a poinding, or under a sequestration for rent; or with his retiring to the Sanctuary for twenty-four hours; or with his making application for the benefit of *cessio bonorum*.

By the Debtors (Scotland) Act, 1880, and the Civil Imprisonment (Scotland) Act, 1882, imprisonment for debt is, with certain exceptions, abolished; but it is provided, by sec. 6 of the Debtors Act, that in any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bank-

ruptcy shall be constituted by insolvency, concurring with a duly executed charge for payment, followed by the expiry of the days of charge without payment, or where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening, prior to execution without payment having been made. Nothing in this section affects the provisions of sec. 7 of the Bankruptcy Act.

Under this section it was held, in *Black* v. *Watson*, 1881, 9 R. 167, that the provisions in sec. 7 of the Act of 1856, requiring a charge to be followed by arrestment, poinding, or adjudication, in cases in which imprisonment was incompetent or impossible, did not apply to cases where imprisonment was only rendered incompetent by the Act of 1880. See also as to the construction of the two Acts, *Macrae* v. *Sutherland*, 1889, 16 R. 476, where Lord President Inglis says that the Act of 1880 extends the modes of constituting notour bankruptcy, just because it removes the mode of constituting it by imprisonment. Sec. 6 is intended solely for the purposes of the Act in which it occurs. "It is such notour bankruptcy as will enable a debtor or creditor to sue out a cessio, and I do not think the law relating to notour bankruptcy was intended to be altered for any other object."

Notour bankruptcy of a company may be constituted in any of the foregoing ways, or by any of the partners being rendered notour bankrupt for a company debt.

It commences from the time when its several requisites concur. When once constituted, it continues, in case of a sequestration, until the debtor is discharged; and, in other cases, until insolvency ceases; but it may be constituted anew within such period.

**Effect of Notour Bankruptcy.**—The 12th section of the Bankrupt Act provides, that all arrestments and poindings*

* This does not include poinding of the ground.

used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall rank *pari passu*, as if they had all been used of the same date. But if any of the competing arrestments be used on the dependence of an action, they "must be followed up without undue delay;" which means, that the debt must be constituted with all speed. It is also provided, that creditors producing, in a process relative to the subject of a prior arrestment or poinding, liquid grounds of debt, or a decree of payment, shall be entitled to rank as if they had executed an arrestment or poinding. And if any arresting or poinding creditor shall, by means of his diligence, recover payment, he shall be accountable for the sum recovered, under deduction of expenses, to any creditor who may have a *pari passu* right to a ranking on the fund; and shall be liable to an action, at the instance of such creditor, for a proportional part of the sum so recovered. See also p. 148.

The provisions of the Bankrupt Act, so far as regards the effect of notour bankruptcy, merely regulate the *pari passu* ranking of arrestments and poindings executed within sixty days of its constitution. The Act does not deal with preferences given by the bankrupt to creditors, or voluntary alienations of his property to conjunct and confident persons. All questions relating to such transactions fall to be determined according to the Acts of the Scottish Parliament before referred to, as interpreted by the numerous decisions of the Court to which they have given rise. These transactions fall now to be considered.

### II. *Alienations by Insolvent Persons.*

Act 1621, c. 18.—The object of this Statute was to enable individual creditors, or the trustee for the general body, to reduce all conveyances or alienations of property, heritable or moveable, made, after contracting lawful debts, by a debtor to any conjunct or confident person without any necessary cause, and without a price paid.

It has been settled that the process of reduction is open to

any creditor, whether his debt was contracted before or after the date of the gratuitous alienations. If the debt was contracted *subsequently*, the *onus* of proving that the debtor was insolvent at the time of the alienation is thrown upon the creditor; but if the debt was contracted *previously*, the presumption is that the debtor was bankrupt at the time; and, unless the conveyance bear on its face that it was granted for an onerous consideration, the *onus* of proving that the granter was then solvent will be thrown upon the receiver of the deed. Actions of reduction, under this statute, are quite competent even though more than sixty days may have elapsed betwixt the date of the alienation and notour bankruptcy; this limitation being applicable only in the case of parties who are *creditors*, and who may have received the conveyance by way of security for their debts.

The alienations struck at by the Act, comprehend the whole of the debtor's heritable and moveable property, and include bills and post-nuptial provisions to wives and children; but the Act does not apply to cash-payments.

The party to whom the alienation is made must be proved to be "a conjunct and confident person." There is no precise rule fixing what class of persons are comprehended under this expression, each case being decided according to its own circumstances. But it may be stated generally that the term comprehends persons who are related to the debtor, or who are connected with him in trade by partnership or otherwise, or who are employed by him.

It must also be proved that the deed was granted gratuitously; that is, without an onerous consideration or price paid. If the grantee in the deed be a creditor of the granter, even for a less sum than the value of the subject conveyed, the Act will not apply to the transaction. Nor will it apply to a deed executed by the granter, in fulfilment of a previous obligation. The mode of proof is not limited, as might seem from the words of the Act, to the "writ or oath of the party receiver," but all the channels of evidence are open to the challenger.

If the deed be granted in favour of a conjunct or confident person, the law presumes that it was made without a just and true cause to the prejudice of prior creditors, and that the debtor was insolvent at the date of granting the deed. In *Dawson* v. *Thorburn*, 1888; 15 R. 1891, a disposition by an insolvent father to his daughter in consideration of fifteen years' service as his housekeeper, was held struck at by the Act, the daughter having failed to prove that the disposition was for a just and necessary cause. To entitle a trustee to the presumption of insolvency, he must represent creditors, whose debts are prior to the date of the deed.

III. *Preferences to Creditors falling within the Act* 1696, *c.* 5.

The object of this Act is to reduce all preferences given to particular creditors within sixty days of notour bankruptcy. The Act declares to be "null and void" all "voluntary dispositions, assignations, or other deeds which shall be found to be made and granted, directly or indirectly," by a bankrupt, "either at or after his becoming bankrupt, or in the space of sixty days before, in favour of his creditor, either for his satisfaction or further security, in preference to other creditors."

Much litigation has occurred as to what classes of transactions fall within the scope of the Act; and such of these as are of practical importance it will be proper to go over in detail. It may, however, be stated generally, that if a debtor, within sixty days of bankruptcy, transfers to his creditor any of his property, heritable or moveable, in security of an old debt, or of a debt previously contracted, such security will be held to be a preference, and reducible under the Act. The Act does not apply to securities granted within sixty days of the bankruptcy for a *bona fide* advance made at the time.

**Payments in Money.**—The Act does not apply to payments in cash, or by a draft on a banker, made or given to a creditor in the ordinary course of business; nor does it apply to the indorsation to a creditor of a bank-order, payable to the debtor,

or his order in payment of a debt already due, but indorsations of cheques will be reduced; *Carter* v. *Johnstone*, 1886; 13 R. 698. Payments in advance, of a debt not due at the time, have been held out of the ordinary course of business, and reducible under the Act. See *Rose* v. *Falconer*, 1868; 6 Macph. 960. Cash payments by an insolvent debtor to a creditor are effectual if not made fraudulently, although both creditor and debtor are aware that the debtor is at the time insolvent; *Coutts' Trustees and Doe* v. *Webster*, 1886; 13 R. 1112.

**Bills.**—It has been decided that bills, indorsed by a debtor to his creditor within sixty days of bankruptcy, in security of a prior debt, fall within the operation of the Act. But a distinction has been made between bills indorsed by a debtor to a creditor, avowedly to provide for a debt previously incurred, and bills indorsed by a mercantile man to his banker or money-agent, in the usual course of trade. In the old case of *Sir William Forbes & Co.*, 1st March, 1791, the Act was found inapplicable to a series of bill transactions on a running account occurring within sixty days of bankruptcy; and the principles of this decision were followed in two subsequent cases—the one having reference to an account between an insurance company and its agents, and the other to an account between underwriters and an insurance broker.

The question again came up with reference to banking transactions in the case of *Blincow's Trustee* v. *Allan & Co.*, 3rd December, 1828, and 22nd January, 1831; affirmed on appeal, 1833; 7 W. & S. 57, when the principle was approved, that bills and drafts indorsed to a banker in the usual course of business did not fall within the scope of the Act. It was observed by Lord Newton, Ordinary, that "had the defenders not been the bankrupt's ordinary bankers, with whom he was in use to discount bills, there would have been little doubt that the transaction, although in the form of a discounting of the bills, and an application of the proceeds by the order of the bankrupt to the payment of his debt, would have been reducible, as falling

under the spirit of the Act. It is said, however, by the defenders, that, being his ordinary bankers, they discounted the bills in question in the course of trade, and only applied the balance which stood in his favour on their running account to the payment of the instalment of the bond, in consequence of his order to that effect." Lord Balgray remarked: "A banker is entitled, in the ordinary course of business, to discount a bill, either by means of cash, or giving credit to the last hour previous to a person's avowed bankruptcy, provided it is done fairly and without reference to any unlawful object. So far, therefore, as relates to the discounting of the bills in question, and placing the proceeds to the credit of the bankrupt, it is clear that no objections can be made."

The above case, it will be observed, refers to bills discounted, the proceeds of which were placed to the credit of the bankrupt. But the same principles would regulate any question of preference in regard to bills indorsed to a banker in the usual course of business, to lie over till maturity, and the proceeds then to be placed to the customer's credit. In the case of *Sir William Forbes*, before referred to, paper of this description was held not to be struck at by the Act. If, however, the bills are indorsed, not in the usual course of business, but for the express purpose of affording a specific security for a prior debt, such a transaction will come within the Act. It is always a question of fact, and for a jury to determine, whether or not bills are indorsed in the usual course of business.

In the case of *Horsburgh* v. *Ramsay & Co.*, 1885; 12 R. 1171, an insolvent, who had for some years been paying his creditors in cash when he could, but frequently by the indorsation of bills received from customers, within sixty days of bankruptcy indorsed three bills not yet due, received for goods furnished. It was held that the indorsations did not fall under the exception in the Act 1696, c. 5 of "Transactions in the ordinary course of trade," and were therefore reducible.

**Transfer of Moveables.**—A deposit, or transfer of mer-

chandise, or other moveable property, in security of a prior debt, falls under the scope of the Act. In the case of *White* v. *Briggs*, 8th June, 1843 ; 5 D. 1164, an example will be found of the reduction of an indorsation of a bill of lading for certain goods, and relative draft, transferred by the debtor to the creditor within sixty days of bankruptcy. In the recent case of *Smith & Co.* v. *Smith*, 1889 ; 16 R. 392, where a firm within sixty days of their sequestration assigned their book-debts to the amount of £387, in security of an immediate advance of £330, and in exchange for a bill for £57, 15s. previously granted by them to the assignee, Lord Young expressed the opinion that this assignation was not struck at to the extent of £57, 15s. by the Act, 1696, c. 5.

**Covert Sales.**—There is nothing in the Act to prevent *bona fide* trading with a debtor up to the time of his legal bankruptcy ; and the debtor may grant valid securities over his estate for cash presently advanced to him. But a sale designedly made by a debtor to his creditor, for the purpose of enabling the latter to plead compensation of the price with his debt or extinguishing so much of it, is reducible as a preference. In order, however, to reduce a sale of this kind, it is necessary to prove collusion, and an intention on the part of the debtor to create a preference in favour of the creditor. But if there be a running account between the parties, and if the sale is made in the ordinary course of business, without any intention to create a preference, the transaction will not come within the Act. See the case of *Stiven* v. *Scott & Simson*, 30th June, 1871 ; 9 Macph. 923. In the recent case of *M'Dougall's Trustees* v. *Gibbon*, 1889 ; 16 R. 740, an indirect preference to a creditor, under circumstances which seem very like an evasion of the Statute, was upheld. The circumstances of this case were these. A, being indebted to B, granted along with a friend C, who was aware of his insolvent condition, a promissory-note to B for the amount of the debt. Of the same date, A disposed in favour of C certain heritable subjects by disposition *ex facie*

absolute, but by back-letter declared to be in security merely of C if he should be called to pay under the promissory-note. A was sequestrated within sixty days of this transaction. The trustee brought a reduction of the disposition on the ground that it conferred a preference on B indirectly in contravention of the Act 1696, c. 5, but did not conclude for reduction of the promissory-note, nor call B as a defender. It was held (diss. Lord Lee) that, looking to the transaction between A and C alone, there was no ground for reduction under the Act 1696, as C was not a prior creditor of A, and that as B was not called as a party to the action, the transaction as a whole could not be considered.

In reductions under this Act it is not necessary to prove that the creditor was in the knowledge of the debtor's bankruptcy, or that he was guilty of fraud in accepting the security.

The securities which are struck at by this Act and sec. 110 of the Bankruptcy Act 1856, are securities created by some act or deed of the bankrupt or deceased debtor, and those provisions do not apply where it is the creditor who has rendered the securities effectual; *Scottish Provident Institution* v. *Cohen & Co.*, 1888; 16 R. 112.

### IV. *Transactions begun before, but completed within Sixty Days of Bankruptcy.*

Numerous questions have arisen as to transactions begun before, but not completed till the sixty days had begun to run. Such questions depend very much upon the circumstances of the particular case; but certain rules, of general application, have been fixed in regard to such transactions.

1. A security for a *prior* debt, granted previous to the commencement of the sixty days, but not completed by registration, intimation, or possession, as the case may be, till they had begun to run, is struck at by the Act. An exception to this is in the case of a security taken by arrestment on dependence of

an action, where a preference is conferred although the debtor be sequestrated before decree is obtained in the action, provided it be followed up without undue delay; *Mitchell* v. *Scott*, 1881; 8 R. 875.

2. The statute does not apply to deeds of security for a *present* advance, granted before the sixty days, although the deed should be registered or intimated within the sixty days.

3. Neither does it apply to acts done within sixty days of bankruptcy, in specific implement of a previous onerous contract; nor to securities granted within the sixty days, provided it was expressly stipulated, at the time when the debt was contracted, that the particular security so granted should be given by the debtor to the creditor as the counterpart of the transaction.

This rule may be illustrated by the following cases decided by the Court:—

*Bank of Scotland* v. *Stewart & Ross*, 7th February, 1811, F.C.—In this case an agent of the bank advanced money on heritable security; and, at the time of making the advance, the titles were delivered to him that the security might be completed. Some delay took place in making up the title, which brought the security within sixty days of bankruptcy; but the Court held the incidental delay not to be fatal to the security.

In the case of *Anderson* v. *Walker*, March and July, 1842; 4 D. 1180, Smith granted an heritable bond to Walker, as for a loan of £1300. Smith was sequestrated thirteen days after the date of the bond. It was proved that the advance was made by Walker who was a bank-agent, previous to the date of the bond, on an overdrawn current-account, but that it was expressly stipulated and agreed upon at the time, as a counterpart of the transaction, that Smith should give heritable security for whatever sums Walker should advance. It was held that the security did not come within the Act. The Lord Justice-Clerk remarked, that "ever since the celebrated case in which Lord President Blair delivered his opinion [the above case of

*Bank of Scotland* v. *Stewart*], it has been held that if the money was advanced on a stipulation for a certain definite security, that security will be good, though only completed subsequently and within sixty days of bankruptcy, if the stipulation be proved in any way."

The same principle was again affirmed in the later case of *Taylor* v. *Farrie*, 1855; 17 D. 639. Here A, sixty-one days before bankruptcy, sold to Farrie his stock-in-trade, &c., and received payment of the price. Possession was taken by Farrie three days afterwards. In an action of reduction, the Court, on the ground that there was no fraud, and that the acts done within sixty days of bankruptcy were not voluntary but only in specific implement of a previous contract, held that the transaction was not reducible.

4. If a transaction be entered into on a promise or obligation to grant a security at a future time, such security is reducible if completed within the sixty days.

This point came up before the Court, in the case of *Moncrieff* v. *Hay*, 1851; 14 D. 200. Here the Union Bank advanced to Tod & Hill £3000, upon their promissory-note, and the deposit of certain securities, accompanied by a letter, binding the parties, "at any time when required," to grant a conveyance of the securities. Six days before bankruptcy a conveyance was granted to the bank. The assignation was reduced, on the ground that the letter of obligation did not import a present security, but was a mere promise to give security at a future time. The reduction of such a security, however, would not destroy any right of lien which the bank had over the securities deposited with them.

In *Stiven* v. *Scott & Simpson*, 1871; 9 Macph. 923, to which we have already referred, it was held that, where a firm of merchants obtained the signature of another firm to a series of accommodation bills, and gave the acceptors invoices of sales of goods retained in the drawer's possession, and partly delivered within sixty days of bankruptcy, such delivery was reducible

under the Act, 1696, and the goods belonged to the bankrupt estate. And in *Gourlay* v. *Hodge*, 1875; 2 R. 738, delivery of goods under the following document was reduced, such delivery having taken place within sixty days of bankruptcy:—

"We have this day received from you £500; and we hereby promise to give you, within one month from this date, delivery orders on stores in Glasgow for wheat, oats, beans, or Indian corn, to the full value of £500."

In this case the delivery took place within the specified month. In *Gourlay* v. *Mackie*, 1887; 14 R. 403, a firm within sixty days of bankruptcy, obtained a loan from another firm, to whom they granted a promissory-note and this letter:—"On consideration of you having this day discounted, for our sole benefit, our acceptance at four months from date, for £462, 10s., and handed us proceeds of same, we hereby hand over to you, as security for same, one hundred shares for £6 paid in Holmes Oil Company, and bind ourselves to transfer same to you at any time during the currency of the bill, if you desire it." The certificate of the shares was at the same time delivered to the lenders. A transfer was executed three weeks thereafter, and fourteen days before the sequestration of the granters. It was held that the transfer was reducible under the Act. In this case Lord Young remarked that "where the stipulation is not for a simultaneous security, but that the debtor shall give security, and I do not care whether it is general or over a particular subject, whenever the creditor sees it is his interest to demand it, that is . . . a device to evade the operation of the statute," p. 410.

In the *Scottish Provident Institution* v. *Cohen & Co.*, 1888; 16 R. 112, it was held that the securities which are struck at by the Act 1696, cap. 5, and sec. 110 of the Bankruptcy (Scotland) Act, 1856, are securities created by some act or deed of the bankrupt. And that these provisions do not apply where it is the creditor who has rendered the securities effectual.

These decisions contain the latest and most authoritative expositions of the present state of the law on this difficult subject, and may be referred to for the particulars of all the leading cases bearing on the point. They are also very satisfactory in this respect, that, in spite of local customs to the contrary, they establish the doctrine that, in Scotland, security over moveables in the debtor's possession cannot be constituted *even in the shape of ostensible sales.*

It is no illegality in a creditor, even within sixty days of his debtor's bankruptcy, to take a guarantee for his debt from a third party; and it does not make the transaction illegal that this third party happens to be a debtor to the bankrupt.

## CHAPTER XVI.

### SEQUESTRATION UNDER THE BANKRUPT ACT.

It is proposed in this chapter to advert to the law of bankruptcy so far only as it may have a practical bearing on the object of this work

Sequestration is a judicial process, by which the effects of a bankrupt may be realised and equitably distributed among his creditors. The process may be raised either in the Supreme or Sheriff Court. It is competent to present a petition to the Court of Session notwithstanding the refusal of sequestration by the Sheriff.

In Scotland, the realisation and distribution of the bankrupt's estate is accomplished through a trustee, elected by the general body of creditors, in whom the estates of the bankrupt, both heritable and moveable, become vested. The trustee is advised and assisted in his duties by three commissioners, also elected by the creditors from their own number. The trustee has the sole charge and control of the estate, and has a discretionary power as to the time and manner of realising it. He likewise judges of the claims of creditors, and admits, modifies, or rejects them, as he may see cause; the creditors having, however, a right of appeal to the Courts of Law against his judgment.

The Bankrupt Law of Scotland is now regulated by the Bankruptcy (Scotland) Act, 1856; the Bankruptcy and Real Securities (Scotland) Act, 1857; the Bankruptcy (Scotland) Amendment Act, 1860; the Act 38 & 39 Vict. c. 26, 29th June, 1875; the Debtors (Scotland) Act, 1880; the Bankruptcy and Cessio (Scotland) Act, 1881; and the Judicial Factors (Scotland) Act, 1889.

Under these Acts, sequestration may be awarded of the

estates of any living debtor who is subject to the jurisdiction of the Supreme Courts of Scotland, whether engaged in mercantile business or not. The application for sequestration may be made by the debtor himself, with concurrence of a creditor whose debt amounts to not less than £50; or of any two creditors whose debts together amount to not less than £70; or of any three or more creditors whose debts together amount to not less than £100.

The estates of a debtor may be sequestrated without his concurrence, on a petition being presented by one or more creditors, qualified as above mentioned, provided that the debtor is notour bankrupt, that the petition be presented within four months of the date of notour bankruptcy, and that the debtor has resided or had a dwelling-house or place of business in Scotland within a year before the date of presenting the petition. It is no objection to sequestration being awarded that the debtor has been made notour bankrupt more than four months before, if he be again made notour bankrupt within four months of the presentation of the petition; *Balfour* v. *Pedie*, 1841; 3 D. 612; and Bankruptcy Act, 1856, sec. 9. Should the petitioning creditor withdraw from the sequestration, another creditor may be sisted, and the Court will, on his petition, appoint the sequestration to proceed as if it had been of new awarded; *Forsyth*, 1883; 10 R. 1061.

The estates of a company may, in like manner, be sequestrated either with or without their concurrence. It is incompetent to sequestrate under the Bankruptcy Acts a company registered under the Companies Acts; the process in this case must be one of winding up as provided by the Companies Acts; *Standard Property Investment Co.* v. *Dunblane Hydropathic Co.*, 1884; 12 R. 328. A company may, however, be made notour bankrupt to the effect of equalising diligences; *Clark* v. *Hinde, Milne & Co.*, 1884; 12 R. 347.

Sequestration of the estates of a debtor deceased is also competent, provided that, at the time of his death, he was subject to the jurisdiction of the Supreme Courts. The petition may

be presented by a mandatory of the creditor, duly authorised to apply for sequestration, or by a creditor or creditors qualified as above. The petition may be presented at any time, but sequestration cannot be awarded until the lapse of six months from the debtor's decease, unless he was notour bankrupt at the time of his death, or unless his representatives concur in the application, or renounce the succession, in which cases sequestration is immediately awarded.

Previous to the passing of the Bankruptcy and Real Securities (Scotland) Act, 1857, sequestration of the estates of deceased debtors could be awarded only by the Supreme Court; but it is now competent for the Sheriff of any county to award sequestration of the estates of a debtor, provided he has resided or carried on business in the county for the space of a year preceding the date of the petition.

In the interlocutor awarding sequestration, the Judge appoints a meeting of creditors to be held on a specified day, in a specified place, for the purpose of electing a trustee and commissioner, of which meeting notice is given in the *Edinburgh Gazette*.

**Of Claims for Voting.**—The validity of a creditor's vote in the election of a trustee, or in any question relating to the administration of the estate, depends upon his claim being prepared in terms of the 1856 Act. Though the general principles by which the votes of creditors are regulated are by no means hard to understand, yet more litigation has arisen from the lodging of defectively prepared claims than from any other source.

The right of voting is limited by the Statute to the actual amount of the creditor's interest in the estate. It is only, however, in cases where the creditor holds security over the estate of the bankrupt, or where he holds other obligants who are liable in relief to the bankrupt, that there is any peculiarity in the claim. If the bankrupt is the sole obligant for the debt, or if he is the *real* debtor, and the creditor holds no security, there is no peculiarity in the claim for voting.

The first matter calling for notice is the form of the oath.

The 22nd section of the Act contains general directions as to the oath to be taken by creditors resident within the kingdom, which are applicable to the cases of voting and ranking, as well as of the concurring creditors.

It provides that the oath by a creditor "shall be taken by him before a Judge Ordinary, Magistrate, or Justice of the Peace, to the verity of the debt claimed by him; and he shall in such oath state what other persons, if any, are, besides the bankrupt, liable for the debt or any part thereof, and specify any securities which he holds over the estate of the bankrupt, or of other obligants; and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound, and no security, he shall depone to that effect."

Where the creditor is a corporation, the oath may be taken by a secretary, manager, cashier, clerk, or other principal officer of such corporation, although not a member thereof; or, in case of other companies, such as a bank not incorporated, an oath by a partner is sufficient; and where any creditor is under age, or incapable, an oath of credulity by his authorised agent, factor, guardian, or manager, is sufficient—(sec. 25). It is most important that the oath should be taken conform to the Act. In the case of *Blair* v. *The North British and Mercantile Insurance Co.*, 1889; 16 R. 325, sequestration was recalled on its being proved that the oath was irregular, though the irregularity did not appear *ex facie* of the proceedings.

To entitle a creditor to vote, he must produce, with his oath, the vouchers necessary to prove the debt. The sum due to a bank on a bond of credit is sufficiently vouched by production of the bond, and an account signed or certified as there provided. But for overdrafts, a detailed account must be produced, along with the relative cheques. An open account should in no case start with a balance due on a previous account, unless it can be vouched by a docquet. In *Low* v. *Baxter*, 1851; 13 D. 1349, a vote on that account beginning "By balance in bank

on current deposit, £4, 9s. 10d.," was rejected, no voucher of the balance having been produced. *Ex facie* evidence of the invalidity of documents or vouchers will exclude claims for votes, but where instant proof is not available, it is incompetent to allow a proof at large in support of an objection to the validity of votes in the election of a trustee; *Gillon* v. *Caesar*, 1882; 10 R. 59; and *Reid* v. *Strathie*, 1887; 14 R. 847.

Where the claimant is a conjunct person with the bankrupt, the vouchers produced will be very narrowly examined: *Witham* v. *Teenan's Trustees*, 1884; 11 R. 776.

The creditor is entitled to vote and rank for the accumulated amount of principal and interest to the date of the sequestration, but not for interest accruing thereafter. If the debt is not payable till after the date of sequestration, the creditor is bound to deduct interest from that date to the date of payment, and if his claim is, by the usage of trade applicable to it, liable to deduction of any discount beyond legal interest, he is bound to deduct such discount. It is not necessary to specify *separately* in the oath or claim, the principal and interest, it being sufficient at once to state the amount of the debt—(sec. 52). Sums received by the creditor after the date of sequestration, from co-obligants, do not fall to be deducted from the claim, though they must be stated in the affidavit for the information of the trustee.

If the claim depends on a contingency, or is for an annuity, the creditor may apply to the Sheriff, if the trustee has not been elected, or, if elected, to the trustee to put a value on such claim; and, on such value being fixed, the creditor is entitled to vote and draw dividends in respect of such value, and no more. If the creditor is dissatisfied with the valuation, he may appeal to the Courts of Law—(secs. 53 and 54).

If the claim of a creditor is not framed in terms of the Act, the trustee is directed, by the 51st section, to call upon him to rectify it, and to point out wherein it is defective; and unless the alteration is made, the claim is to be disallowed or rejected. This provision was introduced with the view of putting a stop

to litigation on points of form. The affidavit requires to be prepared with the strictest accuracy. Votes have been rejected because of erasures in the sum, and the want of the signature of the Justice to a State of Debt prefixed to the affidavit.

When a creditor has an obligant bound to him along with the bankrupt for the debt, such obligant is not freed from his liability because of any vote given, or dividend drawn by the creditor, or of his assenting to the discharge of the bankrupt, or to any composition—(sec. 56). This renders it unnecessary for creditors to obtain the written consent of co-obligants to their acting in the sequestration as they may judge best.

The 57th section exempts creditors who have lodged claims from all liability for expenses incurred by the trustee, even though the estate should not be sufficient to reimburse him.

The following are the sections of the Act embodying the special rules as to voting:—

Section 59.—"If a creditor holds a security for his debt over any part of the estate of the bankrupt, he shall, before voting, make an oath, in which he shall put a specified value on such security, and deduct such value from his debt, and specify the balance; and if the estate over which the security extends be sold, he shall specify in his oath the free proceeds which he has received, or shall be entitled to receive therefrom, and specify the balance due after deduction thereof; and he shall be entitled, in any case, to vote in respect of the balance, and no more, without prejudice to the amount of his debt in other respects; and in questions as to the disposal or management of the estate, subject to his security, he shall be entitled to vote as a creditor for the full amount of his debt, without making any such deduction."

Section 60.—"When a creditor has an obligant bound with, but liable in relief to, the bankrupt, or holds any security from an obligant liable in relief to the bankrupt, or any security from

which the bankrupt has a right of relief, such creditor shall, before voting, make an oath in which he shall put a specified value on the obligation of such obligant, and on such security to the extent to which the bankrupt is entitled to relief, and he shall deduct such value from his debt, and specify the balance; and he shall be entitled to vote in respect of such balance, and no more, without prejudice to the amount of his debt in other respects."

Section 61.—"A creditor on the estate of a company shall not be bound, for the purpose of voting on the company's estate, to deduct from his claim the value which he may be entitled to draw from the estates of the partners: but if he claim on the estate of a partner, he shall, before voting, in his oath put a specified value on his claim against the estate of the company, and also against the other partners thereof, in so far as they are liable to relieve such partner, and deduct such value from his debt, and specify the balance; and he shall be entitled to vote as a creditor for the said balance, and no more, without prejudice to the amount of his debt in other respects."

A few observations may be given in explanation of these sections.

The first point to be noticed is the case of a creditor who holds security for his debt. Although the creditor, in his affidavit, requires to specify *all* securities held by him, it is only securities *over the estate of the bankrupt* that fall to be deducted from his debt, whether in ranking or voting. For example, if the *bankrupt* conveyed to the creditor a house, or a life policy, or indorsed bills in security of his debt, the value of such security requires to be deducted in voting or ranking upon his estate: but if the same or a similar security was given to the creditor, not by the bankrupt, but by a *surety* or *co-obligant*, it does not require to be valued and deducted, as it forms no part of the estate of the bankrupt. All that is required in such a

case is, that the security be specified in the affidavit, for the information of the trustee. A secured creditor who has valued and deducted his security and been ranked for the balance, is not thereby precluded from revaluing the security in claiming for a second dividend; *Commercial Bank of Scotland Limited* v. *Speedie's Trustees*, 1885; 13 R. 257.

The next case is that of a creditor holding an obligant bound for the debt who is liable in *relief* to the bankrupt. In this case, the creditor's right of voting is limited to his true interest in the estate. For example, if the drawer of a bill becomes bankrupt, the holder must, before voting on his estate, value the obligation of the acceptor, who is the true debtor, and liable to relieve the drawer. If the acceptor be quite good for the bill, it is evident that the holder has no interest in the management of the drawer's estate; and in such case he would have no vote. If, however, the acceptor is insolvent or unable to pay the bill, the holder, on deducting the value of his obligation, and of any security granted by him, will have a vote for the balance.

If a surety for a cash-account becomes bankrupt, the bank will have no vote on the surety's estate, unless the principal obligant, for whose benefit the credit was granted, is insolvent or unable to pay it. The principal being bound to relieve the surety, the bank must value his obligation; and, if the principal is well able to pay the debt, the bank cannot with safety value it at a less sum than its true amount, and they have no interest in the administration of the surety's estate. This rule, however, is applicable only to the case of voting, and does not apply, as we shall afterwards see, to a claim for *ranking*. In the case of *Gordon* v. *M'Gubbin*, 1851; 13 D. 1154, it was held that the holder could not vote on the estate of the drawer of bills *current* at the date of the sequestration; on the ground that they might be paid by the acceptor at maturity. If, however, the acceptor is bankrupt or insolvent, and the creditor depones to that effect, the vote will be sustained. Where bills have been drawn against goods in the acceptor's hands, and both

drawer and acceptor have failed while the bills are in the circle, the bill holder cannot claim to have the goods applied in payment of the bills, but must rank on the estates of the drawer and acceptor as an ordinary creditor, and while the acceptor's estate will be entitled to relief and indemnification out of the value of the goods for all dividends paid in respect of the bills, the drawer's estate will have right to the balance of the goods after such indemnity has been given: *The Royal Bank of Scotland* v. *Saunders & Sons' Trustees*, 1882: 9 R. (H.L.) 67. In this case it was held that the English rule (see *ex parte Waring*; 19 Vesey 345, and 2 Rose 182) is inapplicable in Scotland.

**Claim on a Company Estate and Partners.**—On the sequestration of a firm, the funds and property of the company and individual partners being separate and distinct estates, the claims of creditors are dealt with according as they may form debts against the company or against the individual partners. The private creditors of a partner of a firm have no right to vote or rank on the company estate, but the creditors of the company have a right to vote and rank, not only on the company's estate, but on the partners' estates as well. The creditor of a firm may vote on the company estate, without deducting the value of his claim against the partners, but if he claims to vote on the estate of a partner, he must deduct from the amount of his debt the value of his claim against the company estate and the other individual partners so far as liable in relief. Thus, if a creditor has a debt, say of £500, against a company consisting of two partners, and wishes to vote on the estate of the partners, his voting claims will be made up as follows:—

His vote on the company estate will be for the full amount of his debt. But the company estate being liable in total relief to the individual partners, and the one partner being liable in relief to the other to the extent of one-half of the balance, after deducting the value of the claim against the

company, the vote on the estates of the individual partners, supposing the company's estate to yield 5s. in the pound, and the estates of the partners to yield 1s. each, would stand thus :—

| | | | |
|---|---|---|---|
| Amount of debt, | £500 | 0 | 0 |
| Value of claim against company, | 125 | 0 | 0 |
| | £375 | 0 | 0 |
| Value of claim against copartner in so far as he is liable in relief (being one-half of above balance at 1s. per pound), | 9 | 7 | 6 |
| Voting claim on each of the individual partner's estate, | £365 | 12 | 6 |

If a partner of a company conveys his *private* property to a creditor in security of a *company* debt, the creditor is not bound to deduct the value of such security in voting or ranking on the *company* estate. But in voting or ranking on the estate of that partner, the security falls to be deducted in the claim.

In order to prevent securities and collateral obligations from being undervalued, the 62nd section of the Act provides that the trustee, with consent of the commissioners, within two months after the claim has been made use of in voting, or the majority of creditors at any meeting assembled, during such meeting, may require any creditor holding a security for his debt over any part of the estate of the bankrupt, or any obligation or security from an obligant liable in relief to the bankrupt, to assign it to the trustee at the expense of the estate, on payment of the specified value, with 20 per cent. in addition to such value. The payment of 20 per cent., in addition to the value put on the security, holds only in the case of voting. In a claim for *ranking*, the trustee may require a conveyance to the security or obligation as aforesaid, on payment of the value put on it on the creditor's oath. It is competent to the creditor, however, at any time before he has been called on to convey his

security to the trustee, to withdraw his claim, and correct his valuation by a new oath.

**Meetings of Creditors.**—A majority in *value* of the creditors present at any meeting decide on all questions brought before it, except in special cases, the most important of which are as follows:—The renewal of the bankrupt's personal protection; the removal or acceptance of resignation of the trustee; the bank in which the money of the estate is to be deposited; and the direction of criminal proceedings against the bankrupt—all require a majority, both in number and value, of the creditors present. A resolution to wind up under a deed of arrangement, requires a majority in number and four-fifths in value. The entertaining of an offer of composition at the meeting for election of a trustee, and the acceptance of such offer, requires a majority in number and nine-tenths in value of the creditors assembled. The entertaining of an offer of composition made at the statutory meeting held after the bankrupt's examination, and the acceptance of such offer, requires a majority in number and four-fifths in value of the creditors present. The acceptance of any renewed offer requires a majority in number and nine-tenths in value of all the creditors who have produced oaths; and such meeting cannot be called by the trustee unless the offer has previously been entertained in writing by a majority of nine-tenths in number and value of all the creditors ranked or entitled to be ranked.

*Special Rules as to Ranking for Payment of Dividends.*

Section 65.—"To entitle any creditor, who holds a security over any part of the estate of the bankrupt, to be ranked in order to draw a dividend, he shall, on oath, put a specified value on such security, and deduct such value from his debt, and specify the balance; and the trustee, with consent of the commissioners, shall be entitled to a conveyance or assignation of such security, at the expense of the estate, on payment of the value so speci-

fied out of the first of the common fund, or to reserve to such creditor the full benefit of such security; and, in either case, the creditor shall be ranked for and receive a dividend on the said balance, and no more, without prejudice to the amount of his debt in other respects." The creditors should see that the trustee, in his deliverance, either demands a conveyance or assignation of the security, or reserves its full benefit to the creditor; for, if the security was, for example, a policy on the bankrupt's life, his death might raise some nice questions if the trustee's deliverance was not distinct.

Section 66.—"When a creditor claims on the estate of the partner of a company, in respect of a debt due by such company, the trustee on the estate of such partner shall, before ranking such creditor, put a valuation on the estate of the company; and deduct from the claim of such creditor such estimated value, and rank and pay to him a dividend only on the balance."

It will be noticed that, in a claim of ranking for a dividend, a creditor holding a security over the estate of the bankrupt requires to deduct the value of it from his debt, and to specify the balance, on which alone he is entitled to receive a dividend. It is important to observe that the trustee is entitled to demand an assignation of the security, on payment of the sum specified as the value, without the additional 20 per cent., as in the case of voting, no time is specified within which the trustee is entitled to require an assignation; but if undue delay is allowed to take place, he will be held to have acquiesced in the creditor retaining the security. The creditor may sell the security, if entitled to do so, unless interpelled by the trustee, and is not bound to give notice of his intention to sell to the trustee; *Henderson's Trustee* v. *Auld & Guild*, 1872; 10 Macph. 946.

Sometimes it has been found difficult to determine whether the security held is over the estate of the bankrupt, and requires to be deducted from the debt in ranking. Much of the

difficulty will be removed by the application of this simple test, viz. :—Does the property held in security belong to, and was it conveyed to the creditor by the bankrupt? If it belongs to or was conveyed by the bankrupt, then there is no doubt it is a security over his estate, and, as such, falls to be valued and deducted. If, on the other hand, the security belonged to and was conveyed to the creditor by a co-obligant, it does not require to be deducted, but merely stated in the affidavit for the information of the trustee. (See *British Linen Company* v. *Gourlay*, 1877; 4 R. 651.)

In the case of a company, consisting of two or more partners, one of whom conveys to a creditor his *private* property in security of a *company* debt, the value of such security does not require to be deducted in ranking on the *company* estate, but falls to be deducted from the claim on the estate of the individual partner who conveyed it.

The following cases are useful illustrations of the difficulty, whether the security is actually over the bankrupt estate or not :—

A bank made advances to a firm on obtaining as security certain bonds (transferable by indorsation), belonging respectively to A and B, two of the partners, by whom they were blank indorsed and delivered to the bank. Subsequently the firm acquired from A his right to the bonds belonging to him. Thereafter the firm, having become insolvent, granted a conveyance of its estates to a trustee for behoof of creditors, containing a provision that the ranking of the creditors should be regulated according to the Bankruptcy Acts. In an action brought by the bank against the trustee, for declarator that its claim should be ranked without deduction of the value of these securities, Lord M'Laren, Ordinary, held that as the bank had acquired the bonds from third parties, on an absolute title, the subsequent transference of the reversionary right to the firm did not affect the bank's right, and that the value of the securities did not fall to be deducted from the bank's claim. The defender having reclaimed, the Court held, that, in so far

as the bonds belonged to the firm at the date of bankruptcy, the bank's right was a right of security over part of the bankrupt estate, and that, as a condition of ranking, the bank was bound to deduct these securities; *Royal Bank of Scotland* v. *Millar & Co.'s Trustees*, 1882; 9 R. 679.

In the *University of Glasgow* v. *Yuill's Trustees*, 1882; 9 R. 643, it was held that where the debtor has parted with the reversion of the security subjects, the bond holder is entitled to rank on the granter's bankrupt estate for the full sum in the bond without deducting the value of the security.

It will be remembered that, in a voting claim, the creditor is bound to deduct the value of the obligations of parties liable in relief to the bankrupt, but this rule does not hold in the case of ranking. Though such obligations, as well as securities held from *co-obligants*, require to be specified in the claim, for the information of the trustee, they do not require to be deducted from the debt. The creditor is entitled to be ranked on the estates of all co-obligants for the full amount of his debt, and to draw dividends until he is paid 20s. in the pound. Under this rule, a bank is entitled to rank on the estate of all the granters of a bond of credit for the sum due upon it, to the effect of getting full payment. And so in the case of a bill, they are entitled to rank on the estates of the drawer, acceptor, and indorser, for the full amount due on the bill at the dates of sequestration of the respective co-obligants. The Statute makes an exception to this rule in the case of a claim against the partners of a company. The company being bound to relieve its partners from company debts, the trustee is directed, in adjusting the ranking against the partners, to deduct from the claims on their estate the value of the claim against the company; or, in other words, to deduct from the claim against the partner the amount of the dividend which the company estate yields on the particular debt.

It sometimes happens that, in claims by banks upon sequestrated estates which include a number of bills, they draw more than 20s. in the pound on some of them, by ranking on the estates of all the obligants. In such a case the bank is not en-

titled to apply the surplus arising on the overpaid bills towards payment of any deficiency on other bills in their claim. Each bill stands on its own footing, and where more than 20s. is recovered on it, the surplus must be handed over to the party legally entitled to it; *Patten* v. *The Royal Bank*, 1853; 15 D. 617.

The same debt cannot be ranked twice by separate creditors on a bankrupt estate. This would be what is called a double ranking, a ranking which is carefully excluded by the bankrupt law. One or two examples will serve to illustrate the effect of a double ranking. Suppose a bank, under a bond of credit, ranks upon the estate of the principal for the sum due under it, and draws a dividend, and thereafter recovers the balance from a surety, the surety, in this case, is excluded from a ranking on the bankrupt estate, because a dividend has already been drawn in respect of the debt. And so in the case of a bill. If the holder once ranks it, and draws a dividend from the acceptor's estate, the drawer, or any indorser who may afterwards have to pay the balance, has no right to a ranking. The rule against double ranking does not, however, apply where an insolvent debtor has compounded with his creditors, without being made bankrupt, or being divested of his estate; *Mackinnon* v. *Monkhouse*, 1881; 9 R. 393.

Cross bills—that is, bills granted for mutual accommodation—are good considerations for each other; but so long as they remain undiscounted, they extinguish one another. If the bills are discounted, and both parties become bankrupt, the holders are entitled to rank on the respective estates; and though one estate should pay a larger dividend than the other, no claim can be made for the difference by the one estate against the other. If one of the parties has discounted his bill, and becomes bankrupt, and the other, remaining solvent, has to pay both bills, he can only rank on the one accepted by the bankrupt, and cannot rank on the other accepted by himself for the bankrupt's accommodation.

No department of the bankrupt law has been less satisfac-

torily adjusted than that relating to the ranking of cross bills. It has been found impossible to lay down any general rules which will meet the complications arising out of bill transactions, partly onerous and partly accommodation, more particularly where four or five estates are all mixed up with the transactions; and, unfortunately the decisions of the Court are often inconsistent with one another. Every case that occurs presents some features different from its predecessor; and it has been found a matter of so great difficulty, that writers have abstained from laying down many distinct principles on the subject, save the two or three given above, and which are received as axioms in Scottish law.

**Of Company Estates.**—Where two or more persons carry on separate businesses under different firms, the estates of both companies, in the event of sequestration, will be massed together, and the creditors of both will be ranked as if there had been one estate only. The same result will follow where an individual has carried on business in his own name, and an independent business under a company firm, of which he was sole partner. No distinction will be made between the creditors of the firm and those who claimed against the bankrupt individually; *Reid*, 10th July, 1828.

In the case of *Miller* v. *Thorburn*, 1861; 23 D. 359, it was held that the creditor in a bond for a cash-account, granted to Samuel Dickson for the purposes of his trade, and who afterwards assumed his son as a partner, and carried on business under a firm, was entitled to be ranked on the company estate, though the bond had not been confirmed by the company. The Lord Justice-Clerk laid it down as a matter of general principle, "that where a new firm takes over the whole stock and business of a going concern, it is held also to take over the whole liabilities." And Lord Wood remarked, "I can have no doubt, in point of law, that the new company are liable for the proper trade debts incurred by the old concern."

It was held in *Lusk* v. *Elder*, 1843; 5 D. 1279, where a party,

resident in Scotland, and carrying on business there on his own account, was also a member of an English firm, that a bill drawn by the party upon his English firm, fell to be ranked according to the Scotch, and not according to the English law of bankruptcy. The rules of ranking on company estates in England differ from those in Scotland in this respect—that company creditors, as well as the creditors of an individual partner, appear to be entitled to be ranked either on the company estate or the individual estate, as they may themselves select, but not upon both. It would, however, appear to follow, from the above decision, that although a creditor of an English firm had obtained his debt ranked on the company estate, it would form no objection to his claim being also ranked on the estate of any of its partners trading in Scotland, and sequestrated under the Scotch Bankrupt Act.

In *Stuart* v. *Auld*, 1851; 13 D. 1337, where a company which carried on business in Glasgow and Sydney was sequestrated both in Australia and Scotland, it was held that a creditor, who had obtained a dividend of 7s. 6d. per pound in Sydney, could only claim to be ranked in Scotland for his full debt after the Scotch creditors, who had received no dividend from the bankrupt estate in Australia, had received an equalising dividend of 7s. 6d. per pound.

Before leaving the subject of ranking, it may be of use to advert to a feature of the English Bankrupt Law, of much practical importance in connection with the proof of debts. In Scotland, as we have already had occasion to observe, the accounts between a bankrupt and his creditors close as at the date of sequestration. The creditor is not bound to deduct any payments received from co-obligants subsequent to that date, and is entitled to draw dividends on the amount of his claim as it may then stand; II. Bell's Commentaries, p. 306. But it is otherwise in England. The creditor is required to deduct all payments to account, from whatever source received, up to the time of *proving his debt.* It is, therefore, of much practical importance in an English bankruptcy to prove the claim as

early as possible, as otherwise the dividend on sums which may be paid by co-obligants would be lost. The practice is frequently resorted to in England, of refraining from taking payments to account from co-obligants till the creditor's claim is put on the file, in order to prevent the loss of dividends.

### *Of the Division of the Estate, and Payment of Dividends.*

On the bankrupt estate being converted into money, the trustee falls to divide the same among the creditors, according to their several rights and interests. When sufficient funds have been realised, the first dividend is payable on the first lawful day after the expiration of *six* months from the date of the deliverence actually awarding sequestration; and the second dividend is payable on the first lawful day after the expiration of ten months from the same date. Every subsequent dividend is payable on the first lawful day after the expiration of three months from the date of payment of the immediately preceding dividend, until the whole estate is divided; but after the second dividend is made, a majority of creditors, at a general meeting called for the purpose, may resolve to accelerate the times for payment of dividends. The commissioners may postpone the time of payment, and on special application to the Court by the trustee and commissioners, the times of payment of dividends may be altered.

In order to entitle a creditor to payment of the first dividend, he must lodge with the trustee his oath and vouchers of debt at least *two* months before the time fixed for payment of it; and, to entitle him to payment of the future dividends, he must produce his oath and vouchers at least one month before the date fixed for their payment. If a creditor should be too late in proving his debt to get the benefit of the first dividend, he is entitled to an equalising dividend with the other creditors in any subsequent division of the estate, should the funds be sufficient to admit of this.

The trustees must give notice of the time and place of payment of the dividends, by advertisement in the *Edinburgh Gazette*, published next after the expiration of fourteen days from the statutory periods for lodging claims, and by circulars addressed to the creditors, in which he shall specify the amount of the claim and proposed dividend.

If a trustee reject any claim, he must, in his deliverance, state the grounds of the rejection, and notify the same to the creditor by letter, containing a copy of his deliverance. The creditor may appeal to the Sheriff or the Lord Ordinary, if he is dissatisfied with the trustee's deliverance, but the note of appeal requires to be lodged with the Sheriff-Clerk or Bill-Chamber clerk, as the case may be, before the expiration of fifteen days from the publication in the *Gazette* of the notice of dividend.

The main purpose of this right of appeal (B.A. 1856, sec. 86) is to give the Sheriff and the Lord Ordinary jurisdiction to entertain complaints for malversation in office, and it has been held that a creditor is not entitled under it to obtain a review on the merits of the trustee's deliverances on the individual claims lodged in the sequestration; *M'Adam* v. *Martin's Trustees*, 1884; 12 R. 358.

The trustee is directed to lodge all unclaimed dividends in the bank in which the money received by him as trustee was lodged, to the credit of an account kept under the title of "Account of Unclaimed Dividends;" and "The Register of Unclaimed Dividends," kept by the Accountant in Bankruptcy, contains an alphabetical list of all creditors entitled to such unclaimed dividends. Any creditor entitled to an unclaimed dividend may apply to the Lord Ordinary for authority to receive the same, and, upon presenting the warrant at the bank, is entitled to receive the same, but without any interest.

### *Settlement by Composition.*

An offer of composition of so much per pound may be made by the bankrupt, either at the first general meeting of creditors,

or at the meeting after his examination. Security must be offered for the whole composition, otherwise the offer is of no avail.

If the offer be made at the first meeting, a majority of the creditors in number, and nine-tenths in value, present, may resolve to entertain the offer for consideration; and, in such case, the trustee must forthwith insert a notice in the *Edinburgh Gazette* that the offer has been so made and entertained, and that it will be decided on at the meeting to be held, after the examination of the bankrupt, at a specified time, within a specified place. If a majority in number, and nine-tenths in value of the creditors present at the said meeting, accept the offer of composition, a bond of caution must forthwith be lodged in the hands of the trustee. Where the offer is made at the meeting after the examination of the bankrupt, or at any subsequent meeting, a majority in number and four-fifths in value is sufficient. The accounts of the trustee are thereupon audited, and all expenses provided for by the bankrupt; whereupon the trustee reports to the Lord Ordinary, or the Sheriff, as the case may be, the resolution of the creditors, along with the bond of caution; and if no objections are offered, the Judge pronounces a deliverance approving of the composition.

An offer of composition may, in like manner, be submitted at any future meeting of creditors called for the purpose; but once an offer has been rejected by the creditors, no other offer can be made, unless nine-tenths in number and value of all the creditors, ranked and entitled to be ranked, previously assent, in writing, to such offer, which must state the amount of the composition, and be subscribed by the proposed cautioner.

In the deliverance approving of the composition, the bankrupt is discharged of all his debts contracted before the date of sequestration, and he only remains liable for the composition. He is, at the same time, reinvested in his whole estates; but the rights of security and preference creditors remain unaffected. A creditor holding a security over part of the bankrupt estate, must value and deduct before claiming under a composition contract; *Macbride* v. *Stevenson*, 1884; 11 R. 702.

**Recovery.**—The bond of caution for the composition is always recorded in the Books of Council and Session, or of the Sheriff Court, and an extract given to the trustee. Either this, or a new extract, may be obtained by any creditor who has not been paid his composition ; and if the creditor holds a liquid document of debt, such as a bond, bill, or decree, he may obtain letters of horning from the Bill Chamber of the Court of Session to charge the bankrupt and his cautioner to pay the composition within six days, on pain of poinding. If the creditor does not hold a liquid document of debt, he may obtain letters of horning on production of the extract bond with a certificate by the trustee of the amount of the ranking, or of the debt having been given up in the bankrupt's state of affairs. Illiquid claims, which have not been ranked or given up in the bankrupt's state, have not the benefit of summary diligence, but must be constituted by ordinary action. In the recent case of *Hatley* v. *Magistrates of Burntisland*, 1861 ; 23 D. 881, it was held that a cautioner in a composition-contract was not entitled to suspend a charge for payment of the composition, or to object to a debt which had been admitted as due without question in the acceptance of the offer of composition. See section 143.

The bankrupt is not bound to grant composition bills, unless it formed part of the arrangement that he should do so.

The bankrupt is not entitled to object to any debt which he has given up in the state of his affairs as being due by him, or admitted without question, in reckoning whether the necessary amount of consents to the acceptance of the composition has been obtained.

**Discharge without Composition.**—The bankrupt may, immediately after his examination, petition the Court to discharge him of all his debts, provided all the creditors who have produced their oaths consent. At the end of six months, he may petition for a discharge, with consent of a majority in number and four-fifths in value ; at the end of twelve months, with

consent of a majority in number and two-thirds in value; and at the end of eighteen months, with the consent of a majority both in number and value. On the expiration of two years, he may petition for a discharge without any consent of creditors at all. It is, however, necessary, in the first instance, before presenting any petition for a discharge, for the trustee to report on the conduct of the bankrupt, and to state whether he has complied with the provisions of the Act; and, specially, whether he has made a full surrender of his estate, and whether his bankruptcy has arisen from innocent misfortune or reckless trading. No discharge is competent to any bankrupt who has been concerned in, or cognisant of any preference, gratuity, or other means of procuring his discharge. So, in the case of *Pendreigh*, 1875; 2 R. 769, the Court held it their duty to refuse the bankrupt's application for a discharge, although no appearance was made in the application either on the part of the trustee or the creditors. In the case of *Buchanan* v. *Wallace*, 1882; 9 R. 621, failure to keep accounts and other irregularities on the bankrupt's part, were held to warrant the Sheriff in imposing the condition that decree of discharge should not be extractable for three months.

By sec. 3 of the Bankruptcy Amendment Act, 1860, discharge may be refused for fraudulent concealment by the bankrupt of any part of his estate; see *Millar*, 1877; 5 R. 144.

It is open to any creditor to oppose the bankrupt's discharge on reasonable grounds. Discharge, if granted, without composition, does not imply reinvestiture or put an end to sequestration unless the dividends paid amount to twenty shillings in the pound, and the sequestration may be revived after the discharge of both trustee and bankrupt for the distribution of estate of the bankrupt, which has not been expressly abandoned by the creditors; *Northern Heritable Securities Investment Co., Ltd.* v. *Whyte*, 1888; 16 R. 100.

**The Bankruptcy and Cessio Act, 1881.**—Sec. 6 further restricts the right of discharge. That section provides that a

bankrupt shall not at any time be entitled to be discharged of his debts unless it is proved—(*a*) That a dividend of not less than five shillings in the pound has been paid, or that security for payment thereof has been found to the satisfaction of the creditors; or (*b*), that the failure to pay such a dividend has arisen from circumstances for which the bankrupt cannot justly be held responsible. In the event of a discharge being refused, the bankrupt may, on payment of such additional sum as makes up five shillings in the pound, apply again and obtain his discharge in the same manner as if a dividend of five shillings in the pound had originally been paid out of his estate. As to the kind of circumstances for which the bankrupt will or will not be held responsible, the cases of *Clark*, 1883; 11 R. 246; *Boyle*, 1885; 12 R. 1147; and *Phillips*, 1885; 13 R. 91, may be taken as examples.

**Winding-up under Deed of Arrangement.**—This plan was taken from the English Bankruptcy Law, but it has not been found generally suitable in Scotland, and has frequently given rise to much dissatisfaction on the part of creditors. It leaves the estate virtually under the control of the bankrupt, the superintendence of the Court ceasing with the approval of the deed of arrangement. In England this mode of winding-up is frequently resorted to, especially in the case of large concerns, where it is of importance to continue the business for the interest of all parties; and as the arrangement proceeds under the superintendence of the Court of Bankruptcy, the creditors have perfect control over the actings of the bankrupt.

The 35th sec. of the B.A. 1856 provides, that at the meeting for electing a trustee, or at any subsequent meeting called for the purpose, a majority in number and four-fifths in value of the creditors present at such meeting may resolve that the estate ought to be wound up under a deed of arrangement, and that an application should be presented to the Lord Ordinary, or the Sheriff, to sist procedure in the sequestration for a period not exceeding two months; and, on such resolution being carried,

it shall not be necessary to elect a trustee. The bankrupt, or any person appointed at the meeting, may within four days report such resolution to the Court, and apply for a sist. The Judge may hear any party interested; and if he find that the resolution was duly carried, and the application reasonable, he may grant the same, and may make such arrangement for the interim preservation and management of the estate as shall appear necessary. If the sequestration be sisted, the creditors may, at any time within two months, "proceed to the Ordinary, or the Sheriff, a deed of arrangement, subscribed by, or by authority of, four-fifths in number and value of the creditors of the bankrupt; and, after making such investigation as he may think proper, and hearing parties interested, and on being satisfied that the deed has been duly entered into and executed, and is reasonable, the Judge shall approve thereof, and declare the sequestration at an end; and such deed shall be as binding on all the creditors as if they had acceded thereto; provided the sequestration shall have full effect in so far as may be necessary for challenging or setting aside preferences."

If the resolution is not duly reported, or if the deed is not duly executed or approved of, the sequestration shall proceed, and the Judge may make all necessary orders by appointing meetings of creditors, and otherwise, for resuming the necessary procedure.

It may be mentioned here that the 90th section of the Act gives full power to the Sheriff, on application by the trustee, to order an examination of the bankrupt's wife and family, clerks, servants, factors, law-agents, and others, who can give information relative to his estate. It is unnecessary for a trustee to raise an action for production of documents; his proper course is to call for the writs he requires under secs. 90, 91, and 92 of the Bankruptcy Act, 1856; *Selkirk* v. *Service*, 1880; 8 R. 29.

**Preferences and Collusions.**—The 150th section of the Act provides that "all preferences, gratuities, securities, payments,

or other consideration not sanctioned by this Act, granted, made or promised, and all secret or collusive agreements and transactions, for concurring in, facilitating, or obtaining the bankrupt's discharge, either on or without an offer of composition, and whether the offer be accepted or not, or the discharge granted or not, shall be null and void; and if, during the sequestration, any creditor shall have obtained any such preference, gratuity, security, payment, or other consideration or promise thereof, or entered into such secret or collusive consideration or agreement or transaction, the trustee shall be entitled to retain his dividend, and he or any creditor ranked on the estate may present a petition to the Lord Ordinary or to the Sheriff, praying that such creditor shall be found to have forfeited his debt, and be ordained to pay to the trustee double the amount of the preference, gratuity, security, payment, or other consideration given, made, or promised, and if no cause be shown to the contrary, decree shall be pronounced accordingly; and the sums which in such case may be recovered shall, under deduction of the expenses of recovering the same, be distributed by the trustee among the other creditors under the sequestration: and if the sequestration shall have been closed, it shall be competent to any creditor who shall not have received full payment of his debt to raise a multiplepoinding in name of the person who has obtained such preference, gratuity, security, payment, or other consideration or promise as aforesaid, and on the value of the preference, gratuity, or security, or amount of the sum paid or consideration obtained, being ascertained, double such value or amount, together with the amount of the debt of the colluding creditor, shall be ordered to be consigned by him, and shall be divided among the creditors who were ranked or were entitled to be ranked in the sequestration, and have not received full payment of their debts, and who shall lodge claims in such multiplepoinding, according to their respective rights and interests; and such multiplepoinding shall be executed in terms of law against the colluding creditor, and notice thereof at the same time be inserted in the *Gazette*; and in the event

of there being any surplus, after paying the full debts of the creditors, and defraying the expenses of the sequestration or other proceeding, the same shall be paid into the account of unclaimed dividends, as hereinafter provided."

Under this section, the most important case which has occurred since the passing of the Act is the case of *Carter* v. *M'Laren*, Court of Session, 26th October, 1869; H.L., 9th May, 1871; 9 Macph. (H.L.) 49. In this case the defenders, who were creditors of a bankrupt firm, were dissatisfied with the offer of a composition made by the bankrupts, and questioned its competency on technical grounds. At the statutory meeting for entertaining the composition, the defenders protested, and left the meeting along with others who adhered, but the rest of the creditors present at the meeting resolved to entertain the composition, and, at a subsequent meeting, the offer was accepted in terms of the statute. The defenders were not present at this latter meeting, and they appealed against the resolution of the creditors. The Court held the whole proceedings as not within the terms of the Bankruptcy Act. But, intermediately, between the meeting entertaining the offer and the meeting accepting it, a payment was made to the defenders by a neutral person, in the interest of certain creditors who were specially desirous to sustain the composition. This payment was accepted by the defenders on the understanding that no part of it was to be taken from the creditors. But the defenders found out that they had acted in violation of the section before us, and they at once returned the money, with five per cent. interest. On the other hand, the rest of the creditors insisted on the trustee applying to the Court for the enforcement of the statutory penalties—viz., the forfeiture of the defenders' claim on the bankrupt estate, and the payment to the trustee for the benefit of the general body of creditors of double the amount of the preference. The pursuer lost his case, both before the Lord Ordinary and the First Division, but the House of Lords reversed, and remitted to the Court of Session to inflict the statutory penalties; the Lord Chancellor and Lords Chelmsford

Westbury, and Colonsay, exonerating the defenders at the same time from having acted with any *malus animus.*

The 151st section provides that if a bankrupt is concerned in, or cognisant of the giving of such preferences, he shall forfeit all right to discharge, and all benefits under the Act; and discharge, if granted, shall be annulled.

**In England, Bankruptcy** is at present controlled by the Bankruptcy Acts, 1883 and 1890, which consolidate the law on the subject. Under these Acts, a creditor, or creditors, to the amount of £50, or the debtor himself may present a bankruptcy petition, provided the debtor have committed one or other of the following "acts of bankruptcy,"—viz. (1) Executed a conveyance of his property for behoof of his creditors; (2) Made any fraudulent conveyance thereof, or any conveyance of, or charge on, his property, which would be void as a fraudulent preference if he were adjudged bankrupt; (3) Left the country or remained out of it, or left his dwelling-house, or otherwise absented himself, or began to keep house; (4) Filed a declaration of his inability to pay his debts, or presented a bankruptcy petition against himself; (5) Has had judgment obtained against him for any amount, and, execution not having been stayed, has had served on him a bankruptcy notice, and has not within seven days either complied with the requirements of the notice, or satisfied the Court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained; (6) Given notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts; (7) Had execution levied against him by seizure of his goods, under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the Sheriff for twenty-one days. But such "act of bankruptcy" must have occurred within three months before the presentation of the petition. The creditor must found his petition on a *liquid* debt; if the debt

be secured, he must either give up his security for the benefit of the general creditors, or value his security and found on the difference between it and the debt. The Courts having jurisdiction in bankruptcy are the High Court and such County Courts as are not excluded by the Lord Chancellor from having jurisdiction in bankruptcy, and proceedings may be transferred by any prescribed authority from one court to another. On the debt being proved by the creditor, the court makes a receiving order, and a meeting of creditors is called to consider whether a proposal for a composition shall be entertained, or whether it is expedient that the debtor be adjudged bankrupt, and generally as to the mode of dealing with the debtor's property. On the issue of an adjudication of bankruptcy the creditors appoint a trustee, who may or may not be a creditor, and also a committee of inspection from among the creditors, of not more than five or less than three persons, to superintend the trustee. This committee must meet at least once a-month. The trustee can sell the bankrupt-estate, give valid receipts for money, rank, claim, and draw dividends in respect of any debt due to the bankrupt, and, with the permission of the committee of inspection, carry on the business of the bankrupt, conduct legal proceedings relating to his property, borrow to pay debts, and compromise debts, claims, and liabilities.

The bankrupt must give up all his property, except tools and the wearing apparel and bedding of himself and family not exceeding £20 in all, and the Court may make an order for the payment to the trustee of any pay, salary, or pension to which the bankrupt is entitled, or to any part thereof.

The bankrupt may at any time apply for discharge, but this will either be refused, or suspended for not less than two years, or until a dividend of not less than ten shillings in the pound has been paid, or only granted conditionally on his consent to have judgment entered against him for the balance of his debts, out of future earnings or after-acquired property, unless his assets are of a value equal to ten shillings in the pound, or the fact that they are not so has arisen from circumstances for

which he cannot justly be held responsible, and unless his conduct be satisfactorily reported upon by the receiver.

In the case of small bankruptcies, where the Court is satisfied that the property of the debtor is not likely to exceed in value £300, the court may make an order that the estate be administered in a summary manner, where the official receiver is the trustee, and acts without a committee of inspection.

The affairs of insolvents are very frequently settled by means of a composition or scheme of arrangement; for the forms relating to which, see The Bankruptcy Act, 1890, sec. 3.

## CHAPTER XVII.

### TRUST-DEED FOR CREDITORS, COMPOSITION-CONTRACT, AND CESSIO BONORUM.

**1. Trust-Deed.**—Where the creditors of an insolvent party are desirous of coming to a fair distribution of the estate, the trust-deed is a safe and economical arrangement, and the division may be carried out more expeditiously than under the Bankrupt Act. Unless, however, the creditors are quite unanimous, the arrangement is very liable to miscarry; and, indeed, where one or more creditors refuse to accede to the trust, it is needless to proceed with it, as it may at once be defeated by any creditor using diligence against the person or the estate of the debtor. As the arrangement is extrajudicial and voluntary, diligence can alone be prevented by the consent of the creditors. If certain of the creditors have obtained voluntary or judicial preferences over the debtor's estate, and refuse to renounce them, they cannot well be reduced under a trust-deed, and in such a case sequestration ought to be resorted to.

The usual method of proceeding where a trust-deed is resolved on, is by the debtor conveying his whole estates, heritable and moveable, to a trustee or trustees, in succession, in trust for behoof of his creditors, according to their respective rights and interests. The deed is irrevocable during insolvency. The title of the trustee is completed as in the case of ordinary conveyances. It is desirable to enumerate the creditors and the amount of their debts, either in the deed or in a separate schedule, signed as relative to it, as this saves disputes as to the claims of creditors, and has the effect of preventing the debts from prescribing, which would not otherwise be the case. It is quite settled that a trust-deed which does not specify the

creditors, and the amount of their debts, has not the effect of a reconstitution of the debts, so as to prevent prescription; *Blair* v. *Horn*, 28th November, 1868.

All creditors, at the date of granting the deed, are entitled to share in the distribution, future creditors being entitled to share only in the reversionary right. For the purpose of realising and dividing the estate, the trustee is vested with full powers of sale, and empowered to judge of the claims of creditors. The deed, also, generally contains a provision that the trust shall be administered, and the claims of creditors dealt with, according to the rules of the Bankruptcy Act, but a creditor is not bound by such conditions unless he consents to them. The deed being voluntary must be unconditional. Thus, where the trust-deed contained the condition that all creditors acceding or receiving a dividend should be held to have discharged their claims in full, it was held that a non-acceding creditor was entitled to his share in proportion to his debt unconditionally, and that he was entitled to recover his share by direct action against the trustee; *Ogilvie & Son* v. *Taylor*, 1887; 14 R. 399. Lord Young remarked, "It is quite certain that no debtor is allowed to put his estate beyond the reach of his creditors, or to prescribe conditions on which alone they are to be allowed to participate." A provision for the debtor's discharge is not one of such an extraordinary character as to render the voluntary trust invalid; *Henderson*, 1882; 10 R. 185.

The deed also contains a conditional discharge to the debtor, by declaring that the creditors' acceptance of the dividend shall be in full satisfaction of their debts. It is a condition of a trust-deed that the trustee shall account to the granter for any balance after the creditors have been paid.

The accession of the creditors to the trust may either be express or implied. Express accession is proved by the signature of the creditor or his mandatory to the deed of agreement, or by signing minutes of meeting of creditors. Accession may also be inferred from the actings of the creditor, such as his attendance at a meeting at which common measures are resolved

upon without his dissenting from them. In one case it was held that a creditor had acceded by attending a meeting at which a resolution was passed without objection authorising an agent to see that no preference was obtained by any of the creditors. Acting as a commissioner on the estate, or lodging a claim in the trust, with a view to drawing a dividend, will also infer accession. In short, any actings on the part of a creditor calculated to deceive others into a line of conduct which they would not have pursued had they been aware of his opposition, will debar such creditor from proceeding with separate measures.

The assent given by each creditor is understood to be given on the express understanding that all the other creditors will accede, and that no creditor has received any undue advantage. If, therefore, any non-acceding creditor proceeds with diligence against the person or estate of the debtor, any acceding creditor is, in such case, also entitled to adopt whatever legal measures he may think proper.

The effect of accession, where all the creditors have agreed to the trust, is to bind each creditor to co-operate with the general body, and to debar him from using separate diligence against the person or estate of the debtor. It is important for creditors who have other obligants bound with the debtor, and to whom he is liable in relief, to keep in view that, by acceding to the trust without first obtaining the consent of such obligant, he may thereby be released from his obligation. It is a fixed rule of law, that in the division of an insolvent estate among creditors, a secured creditor is at common law entitled to rank for the full amount of his original debt, without deduction of the value of his security or any sums which he may have realised from it, even although the process is one of Judicial Factory under the 164th section of the Bankrupt (Scotland) Act, 1856; see *Wight's Trs.* v. *Jamieson*, 1863; 1 Macph. 815.

The trustee is not directly subject to the control of the Courts of Law; and where he does not accomplish with due diligence the purposes of the trust, or delays to account for his intromissions, it is extremely difficult for the creditors to obtain redress.

The trustee is not bound to denude, except on the unanimous call of the creditors, and even then, it may require an expensive and protracted litigation before the Supreme Courts to accomplish that object. This forms the great evil in reference to trusts, and renders it necessary, in every case, for the creditors to see that the trusteeship is given to a person of integrity, and one who is well qualified for the office.

**2. Composition-Contract.**—A composition-contract is an arrangement between a debtor and his creditors, whereby the debtor agrees to pay his debts either in full, or a portion of them in place of the whole, by instalments of so much per pound at fixed periods. The arrangement is generally carried out in practice by a minute of agreement, signed by the debtor and his creditors, whereby the former binds himself to pay, and the latter agree to accept of the composition offered in full of all claims. Less formal evidence may, however, bind the parties, such as assenting to a minute of the creditors, embodying the arrangement.

A composition-contract implies that all the creditors concur in it, and that they shall all be dealt with equally. If one or more of the creditors do not agree to the arrangement, or if any of them receive a higher composition than the others, any creditor may take exception to the contract, and may refuse to implement it, or reduce it, if it has already taken effect. The arrangement presupposes that every creditor has agreed to it only on condition of there being a fair and equal distribution of the estate among all the creditors. A creditor holding security over any part of the bankrupt's estate must value the security and deduct before claiming; *Macbride* v. *Stevenson*, 1884; 11 R. 702; but where the burdened subjects have been sold and so have ceased to be part of the estate of the bankrupt, the bondholder may rank for the full sum in the bond without deducting the value of the security; *University of Glasgow* v. *Yuill's Trustees*, 1882; 9 R. 643.

The practice of carrying out the arrangement is not by any

means uniform. The more correct method is by the debtor issuing composition bills to the creditors, and receiving up the original grounds of debt discharged. In this way the arrangement is placed on the most distinct footing, and is freed from many complications and risks which might otherwise arise. If, after composition bills be issued and the original grounds of debt given up discharged, the debtor fails to implement the contract, and is sequestrated, the creditors will rank for the amount of the composition only, under deduction of any instalments they may have received. And in this there is no hardship to any particular creditor, as all the others are precisely on the same footing.

Where the arrangement is allowed to stand simply on the written contract, without the issue of composition bills, and afterwards breaks down, the rights of creditors will fall to be determined in any subsequent sequestration according to the terms of the contract. If it contains an *absolute* discharge, without any proviso that the original debt shall revive if the composition is not paid, it would probably be held in Scotland, as in England, that the creditor is entitled, in a subsequent sequestration, to rank only for the unpaid portion of the composition. If, on the other hand, the contract contains a conditional discharge only, the original debts of the creditors revive, and they are entitled to prove for the full amount thereof, under deduction of any sums they may have received from the debtor.

It is also a settled point, that if the debtor does not pay the composition at the time it falls due, when no discharge has been given, the original debt will revive; and it will not avail him, as a defence to a process brought against him for the original debt, to offer payment of the composition. This was decided in the case of *Woods, Parker & Co.* v. *Ainslie*, 1860; 22 D. 723. In this case the Union Bank, Sunderland, agreed to accept of a composition of 4s. in the pound on certain bills. The debtor paid one half of the composition, but failed to pay the other. A suit having been brought against him for pay-

ment of the original debt, less the sum received, he pleaded in defence, that, before the action was raised, he frequently offered to pay the balance of the composition, and now offered to do so. The Court held the defence irrelevant, and pronounced decree for the pursuer; the Lord Justice-Clerk remarking, that "it is part of the law of mutual contract, by which, if the condition of paying the composition be violated, the original debt will revive."

The composition-contract being a voluntary arrangement, creditors agreeing to it require, in the first instance, to obtain the consent of any obligants bound for the debt, to whom the debtor is liable in relief, otherwise such obligants will be discharged.

**3. Cessio Bonorum.**—*Cessio Bonorum* was, under the old law, a process whereby an insolvent debtor, incarcerated for *civil* debt, or against whom a warrant of imprisonment had been issued, might secure his personal freedom. By the abolition of imprisonment for debt (43 & 44 Vict. c. 34 and 45 & 46 Vict. c. 42) *cessio* in this sense became unnecessary and practically obsolete. Subsequent legislation has remodelled the process in a form which is simply a cheap and summary sequestration, proceeding on a petition either by the debtor himself or by a creditor. The Acts now regulating *cessio* are 6 & 7 Will. IV. c. 56, 39 & 40 Vict. c. 76 and, under its altered character, the Debtors (Scotland) Act, 1880, 43 & 44 Vict. c. 34, and the Bankruptcy and Cessio (Scotland) Act, 1881, 44 & 45 Vict. c. 22. By sec. 7 of the Debtors Act, 1880, any debtor who is notour bankrupt may present a petition for decree of *cessio bonorum*: this petition must be in the form provided by 6 & 7 Will. IV. c. 56, sec. 3, setting forth the notour bankruptcy of the debtor, and his willingness to surrender his estate, and containing a list of all the creditors, specifying their names, designations, and places of residence so far as known. By sec. 8 of the Debtors Act, any creditor of a debtor who is notour bankrupt may present a petition to the

Sheriff of the County in which such debtor has his ordinary domicile, setting forth that he (the debtor) is unable to pay his debts, and praying that he may be decerned to execute a disposition *omnium bonorum* for behoof of his creditors, and that a trustee be appointed to take the management and disposal of the estate for such behoof, and such process shall be taken and deemed to be a process of *cessio*. In the petition there must be inserted a list of all the creditors of the debtor, specifying their names, designations, and places of residence, so far as known to the petitioner; and with the petition must be produced evidence that the debtor is notour bankrupt. Where the debtor has only moveable estate, the disposition is generally dispensed with, but it is necessary to the trustee as a title to heritable estate. By sec. 9 of the Debtors Act, on a petition for *cessio* being presented either by the debtor or by a creditor, the Sheriff, if satisfied that there is *prima facie* evidence of notour bankruptcy, shall issue a warrant appointing the petitioner to publish a notice in the *Edinburgh Gazette* intimating that such petition has been presented, and requiring all the creditors to appear in Court on a certain day, not less than thirty (altered, by the Bankruptcy and Cessio Act, 1881, sec. 12, to eight) days from the date of the *Gazette* notice, the petitioner being bound, within five days from the date of the notice, to send a copy to all the creditors. Thereafter the debtor is ordained to appear before the Sheriff for public examination, and to lodge a state of affairs. The section also deals with the procedure to be observed at the public examination, with the penalties for refusal to answer questions, or produce books, etc., and with the Sheriff's discretion to grant or refuse the petition.* Until the debtor executes a disposition *omnium bonorum*, any decree decerning him to do so operates as an assignation of his moveables in favour of the trustee. The expenses are payable out of the readiest of the funds conveyed by the disposition.

* *Reid* v. *Anderson's Trustees*, 1890; 17 R. 757.

By the Bankruptcy and Cessio Act, 1881, sec. 9, if the debtor fails to appear, in obedience to the citation in a process of *cessio bonorum*, at any meeting to which he has been cited, and if the Sheriff is satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio*. By sec. 10, the Sheriff may, in order to secure the attendance of the debtor, or any one who can give information as to his estate, grant the warrants and commissions which he is empowered to exercise in processes of sequestration under the Bankruptcy Act, 1856, secs. 88, 90, and 91. By sec. 11, where the liabilities of the debtor exceed £200, the Sheriff may, if he thinks it expedient that the distribution should take place under the Bankruptcy Acts, award sequestration, and thereupon the provisions of these Acts shall apply, as if sequestration had been awarded on a petition under sec. 29 of the Act of 1856. The discretion of the Sheriff as to the form of distribution in such a case will not be interfered with; *Jaffray* v. *Fleming*, 1883; 10 R. 719.

**Trustee in Cessio.**—By sec. 9 of the Debtors Act, sub-sec. 3, the trustee is nominated by the Sheriff on the suggestion of the creditors; and if they do not agree, the Sheriff makes his own selection. Trustees are subject to the control of the Accountant in Bankruptcy; their powers and functions are very fully dealt with in A.S., 22nd December, 1882, which may be referred to. On a final division of the funds, the trustee may obtain his discharge from the Accountant in Bankruptcy (Bankruptcy and Cessio Act, 1881, sec. 8).

**Discharge of Debtor.**—Sections 5 and 7 of the Bankruptcy and Cessio Act, 1881, provide for the discharge of debtors in *cessio*. The debtor may apply for discharge on the expiration of six months from the date of decree, but he is not entitled to discharge unless (*a*) a dividend of five shillings in the pound has been paid, or security therefor has been found to the satisfaction of the creditors; or (*b*) the failure to pay five shillings in the pound has, in the opinion of the Sheriff, arisen from

circumstances for which the debtor cannot justly be held responsible. In the event of discharge being refused, the debtor may apply again, on paying such additional sum as makes up a dividend of five shillings in the pound.

Apart from these statutory provisions, decree of *cessio* does not discharge the debtor of his debts; and should he subsequently succeed to funds, or accumulate them through industry, the decree will not preclude the creditors from making such funds available for payment of their debts, if the effects surrendered under the *cessio* have been exhausted *primo loco*. The debtor must surrender everything except his working tools, and so much of his salary or wages as is necessary for his aliment; *Simpson* v. *Jack*, 1888; 16 R. 131.

Petitions for *cessio* are now competent only before the Sheriff Court.

## CHAPTER XVIII.

### OF THE TRANSFER OF GOVERNMENT AND BANK STOCKS.

The principal part of the Funded Debt of the United Kingdom consists of the Consolidated Stock, which bears interest, payable quarterly, at the rate of $2\frac{3}{4}$ per cent. until 5th April, 1903, and thereafter $2\frac{1}{2}$ per cent. The Unfunded Debt consists chiefly of Exchequer Bills, which are issued, under the authority of Parliament, for sums ranging from £100 to £1000. These bills are issued in anticipation of the revenue, and bear interest at rates which have hitherto fluctuated, but averaging of late $2\frac{1}{2}$ per cent. Exchequer Bills may be transferred from hand to hand, and the holders are entitled to receive their amount from Government periodically, at par, with interest; or they may be exchanged for new bills. There are two classes of these bills in the market, one class payable or renewable on 11th March and 11th September, the other on 11th June and 11th December in each year.

The Public Stocks, as well as the Indian Stocks, are managed for the Government by the Bank of England. All transfers of these and of Bank of England Stock are made in the books of the bank; and, if the holder cannot attend personally, the transfer can only be made under a power of attorney in favour of some one who can attend. The bank's books are the sole evidence of how the stock stands, and of its amount; the stock-receipts being of no value in themselves against the bank. The Bank of England does not recognise trusts; and, with the exception of corporations, will not open accounts for stock in name of firms, or of persons other than individuals. It is, however, common to invest trust-funds in the Government Stocks, in name of trustees as individuals, but the bank will

not accept of more than four names in one account. When the stock stands in more than one name, the account is termed a "Joint Account." On the decease of any of the holders, the stock is at the disposal of the survivors; but, before any transfer can be made, or before a power of attorney can be procured by the survivors, the death of the deceased must be proved by burial certificate and declaration of identity.* On the death of an individual holder, probate, or confirmation of the will must be exhibited at the bank, to enable the executor to dispose of the stock or draw the dividends. The dividends are payable at the Bank of England; and if the holder cannot attend to receive and discharge them, he must authorise some one to do so for him by a regular power of attorney. On the purchase of stock by a party resident at a distance from London, the practice is, to grant a power of attorney to a London banker to accept the transfer and draw the dividends. A general power may, however, be obtained for acceptance, drawing dividends, and sale. Separate powers of attorney are required for the different kinds of stock; and, in the case of a power to sell, it must accurately describe the particular stock, and its amount. In a power to draw dividends, the amount need not be mentioned, as it will include all subsequent purchases.

When a power is applied for, it is necessary to give the names and addresses of the parties as they stand in the books of the bank, or to send the stock receipt for the guidance and satisfaction of the bank, in issuing the power.

A power to draw dividends is *cancelled* by the granting of a new power to some other person, or by the holder drawing his dividend in person. A power by the holders of a joint account does not fall by the death of one of them; but, in this event, it is necessary to prove the decease by production of the burial certificate and declaration of identity. The bankers

* An Extract of Entry of Death under the 58th section of the 17 & 18 Vict. c. 80, may supply the place of a Burial Certificate.

throughout the country are in use to take charge of buying, selling, and drawing dividends on Government Stock for their customers.

As regards the stocks of the Scotch Banks, the transfers of the British Linen Bank Stock are written in the books of that bank; and where the proprietors of stock cannot attend personally to sign the transfer, they must grant a power of attorney to some person to sign for them. These powers must be got from the bank. There is nothing peculiar in the form of the power, but it must describe accurately the stock to be transferred; and give special power to the attorney for executing the transfer in the books of the bank. The transfers of stocks of the other Scotch Banks are written on sheets of stamped paper, and recorded in the books of the bank, who retain the deeds of transfer. Acceptances of transfers of bank stock by purchasers may be made by a mandatory, who may be authorised to accept by simple letter, but the letter must now bear a 10s. stamp. The Scotch banks do not object to receive trustees as shareholders; and, to suit the wants of the public, the stocks are permitted to be sold and transferred in any quantities. Trustees are personally liable for calls; *Muir* v. *City of Glasgow Bank*, in the Court of Session, 1878; 6 R. 392; in the House of Lords, 7th April, 1879; 6 R. (H.L.) 21.

The dividends may be drawn by a mandatory, and his authority, if in the shape of a letter addressed to the bank requesting the bank to pay him, requires no stamp. But, on the other hand, if the document assumes the form of a delegation of authority to a mandatory to uplift, a 10s. stamp is exigible. It has been decided, that where dividends on bank stocks are allowed to lie over without being drawn by the proprietor, the bank is not liable to pay interest for the period which may have elapsed from the time they became due; see *Fraser* v. *Aberdeen Banking Company*, 28th June, 1826.

Bank Stocks may frequently be obtained at the offices of the respective banks, without incurring the expense of brokerage.

The charge for brokerage in Edinburgh and in Glasgow is 10s. per cent. The rule on the exchange is, that the buyer pays the expense of transfer, which, including brokerage, on the Edinburgh and on the Glasgow scale, is one per cent. on the purchase money, besides a trifling fee charged at the bank for the transfer.

# APPENDIX.

# APPENDIX.

## FOREIGN BILL.

PARIS, 1*st January*, 1876.

Sixty days after sight pay this, our first of exchange, second and third of the same tenor and date unpaid, to the order of Messrs. Coutts & Co., the sum of One thousand pounds, value received, and charge the same to account of

MONCREIFF & Co.

Messrs. Thomson & Sons,
Merchants, Glasgow.

(*Indorsed on the back*) Pay to A B.
(*Signed*) COUTTS & Co.

(*Or the payee's signature may alone be indorsed.*)

## INLAND BILL.

£100 sterling.

EDINBURGH, 1*st January*, 1876.

Three months after date (*or*, after sight ; *or*, on demand) pay to me or order, at the Bank of Scotland in Glasgow, the sum of One hundred pounds, value received.

(*Signed*) J. M'LAREN.

To Messrs. Anderson & Co.,
Merchants, Glasgow.

(*Indorsement same as above.*)

## BILL PAYABLE BY INSTALMENTS.

£500 sterling.

EDINBURGH, 1*st May*, 1876.

At three, six, and nine months after date ; by equal instalments, pay to me or my order, at your warehouse in Princes Street here, the sum of Five hundred pounds, value received.

(*Signed*) JAMES FORSYTH.

To Andrew Ferguson, Esq.,
Merchant, Edinburgh.

---

## PROMISSORY-NOTE.

£1000 sterling.

EDINBURGH, 1*st April*, 1876.

One day after date (*or*, on demand ; *or*, at months after date) I promise to pay to James Henderson or order, within the National Bank of Scotland, the sum of One thousand pounds, value received.

(*Signed*) JOHN BARCLAY.

(*Indorsement as in bills.*)

---

## BANKER'S CHEQUE.

EDINBURGH, 1*st May*, 1876.

To the Manager of the
Bank of Scotland.

On demand pay to or bearer (*or*, or order), One hundred pounds sterling.

(*Signed*) JAMES FAIRBAIRN.

£100 sterling.

## PROTEST OF A BILL AT THE INSTANCE OF AN INDORSEE.

(*Prefix copy of the bill and indorsation.*)

At Edinburgh, the Fourth day of May,
Eighteen hundred and seventy-six years.

The principal bill above copied was, where payable, presented and duly protested by me, Notary Public subscribing, at the instance of Alexander Dunn, Grocer in Edinburgh, the indorsee (*if there is no special indorsation, say*, the holder thereof), not only against the above named A, the acceptor, for non-payment of the contents, but also against the drawer and indorser for recourse, and against all concerned for interest, damages, and expenses, as accords (*or in the case of a foreign bill, say*, for exchange, re-exchange, interest, damages, and expenses, as accords), before and in presence of Thomas Anderson and James Finlay, both clerks to me, Notary Public, witnesses to the premises specially called and required.

[NOTE.—*The practice in Glasgow, in writing out protests, is to leave out all reference to the bill being presented at the place of payment, and make the instrument simply to bear that the bill "was duly protested," as in the next form.*]

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## PROTEST AT THE INSTANCE OF THE DRAWER.

(*Prefix bill as before.*)

At Glasgow, the Fourth day of April,
Eighteen hundred and seventy-six years.

The principal bill, above copied, was, where payable, duly protested by me, Notary Public subscribing, at the instance of the above named A, the drawer thereof, against the also above named B, the acceptor, for non-payment of the contents, and for interest, damages, and expenses, as accords, before and in presence of, &c.

## PROTEST OF A PROMISSORY-NOTE AT THE INSTANCE OF THE HOLDER.

(*Prefix copy and indorsation.*)

At Edinburgh, the Fourth day of March,
Eighteen hundred and seventy-six.

The principal promissory-note, above copied, was, where payable, presented and duly protested by me, Notary Public subscribing, at the instance of C, the holder thereof, not only against the above named A, the granter, for non-payment of the contents, but also against the above named B, to whom the same is payable, and indorser thereof, for recourse, and against all concerned, for interest, damages, and expenses, as accords, in presence, &c.

---

## PROTEST OF A BILL FOR NON-ACCEPTANCE.

At Edinburgh, the Twentieth day of December,
Eighteen hundred and seventy-six.

The principal bill, above copied, was, in the personal presence of the above named C (*or*, at his dwelling-house), duly protested by me, Notary Public subscribing, at the instance of D, merchant in Edinburgh, the last indorsee (*or*, holder), not only against the said C, on whom the same is drawn, for non-acceptance, but also against the drawers and indorsers, jointly and severally, for recourse, and against all concerned, for interest, &c. (*as in preceding form*).

---

## PROTEST OF THE SAME BILL FOR NON-PAYMENT.

At Edinburgh, the Twenty-third day of March,
Eighteen hundred and seventy-six.

Which day I, Notary Public subscribing, at the request of the above named D, the last indorsee of the bill above copied, passed to the bank of (*or other place of payment*), where the said bill is payable; and thereafter exhibiting and reading over the same, I represented that it had become due

since the date of the protest taken thereupon for non-acceptance, on the day of last, and demanded payment of the contents thereof; which demand not being complied with, I duly protested the said bill, at the instance of the said indorsee, not only against the said C, on whom it is drawn, for non-payment of the contents thereof, but also against the drawers and indorsers, jointly and severally, for recourse, and against all concerned, &c. (*as in preceding form*).

---

WHERE THE BILL IS PROTESTED FOR NON-ACCEPTANCE AND NON-PAYMENT AT THE SAME TIME, THE INSTRUMENT WILL RUN THUS:—

The principal bill, above copied, was by me, Notary Public subscribing, presented to the above named C, on whom it is drawn, and acceptance and payment having been refused, it was duly protested, at the instance of B, the last indorsee, against the said C, for non-acceptance and non-payment of the contents, and against the drawers, &c. (*as in preceding form*).

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PROTEST WHEN SERVICES OF A NOTARY CANNOT BE OBTAINED.

At Edinburgh, the Third day of May,
Eighteen hundred and ninety.

Know all men that I, A B [householder], of in the county of , in the United Kingdom, at the request of C D, there being no notary public available, did on the day of 189 at demand payment [*or* acceptance] of the bill of exchange hereunder written, from E F, to which demand he made answer [state answer, if any], wherefore I now, in the presence of G H and J K, do protest the said bill of exchange.

(*Signed*) A B.

G H, *witness.*
J K, *witness.*

*N.B.*—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

## RECEIPT ON A PROTEST BY A BANK TO ITS CORRESPONDENT.

(*Date.*)

Returned unpaid to the debit of the Bank of Scotland, with nine shillings charges.

(*Signed*) COUTTS & Co.

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## RECEIPT ON A PROTEST BY A BANK AGENT TO THE DRAWER OF A BILL, WHO HAS PAID IT AFTER THE DATE OF THE INSTRUMENT.

BANK OF SCOTLAND,
GLASGOW, 1*st May*, 1876.

Received from A B, the drawer of the above-mentioned bill, the contents thereof, and charges. No diligence to go out in name of the Bank of Scotland.

(*Signed*) ANDREW NEILSON,
Manager of the Bank of Scotland, Glasgow.

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## DOCUMENT BILLS AND FOREIGN CREDITS.

*Form of a "Clean" Credit*, i.e., *a Credit without any condition attached to it, as to delivering Shipping Documents to the Granters, or otherwise.*

To A B & Co.,
Merchants in Calcutta. LONDON, 21*st March*, 1876.

GENTLEMEN,—We hereby authorise you to draw upon us to the extent of £ (*say*) thousand pounds; and your drafts to this extent, at months' sight, payable here, will meet with due honour on presentation, on our receiving advice from you of the same.—We remain, &c.

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*Form of Marginal Credit.*

No. £

LONDON, 2*nd May*, 1876.

Messrs. A B & Co. are authorised to value on us, at months' sight, for the sum of £ sterling, and we hereby

agree with the drawers, indorsers, and *bona fide* holders of the bill to be drawn in virtue of this letter of credit, granted in triplicate, and numbered , that one copy of the same (the others not being accepted or paid) shall be duly honoured, provided this engagement be attached thereto, and the bill be presented to us for acceptance within from this date.

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*Form of Letter of Hypothecation.*

Messrs. C D & Co.,
Merchants, Liverpool.

CALCUTTA, *4th June*, 1876.

GENTLEMEN,—You have herewith our bill No. , dated , at six months, on Messrs. A B & Co., London, for £ sterling, collaterally secured by bill of lading for bales Jute, shipped per , with order for delivery of policy of insurance, costing, exclusive of commission, Company rupees, which bill is to receive acceptance on presentation.

In the event of the bill being refused acceptance, or not being paid at maturity, the holders are hereby expressly authorised—(at any period after such refusal to accept, without either notice to or concurrence on the part of any person or persons)—to sell the said goods for account, at such time and in such manner as they may see advisable, applying the proceeds to the payment of the bill and all charges that may have been incurred connected therewith; and we engage to make good any deficit, should such arise, immediately on the same being applied for, and in the event of non-delivery of the policy of insurance, the holders are hereby authorised to effect the necessary insurance, the cost of which we engage to make good, as above provided.

Should the bill not be paid on the arrival of the (ship), the holders are hereby authorised to enter, warehouse, and protect the goods by fire insurance, the charges for which are to be paid before the documents are delivered up. We have instructed

the drawees, in the event of war, to insure the shipment against the risk of capture, and to hand the policy to the holders of the bill. Should they not do so, we hereby authorise the holders of the bill to effect the necessary insurance, the cost of which must be paid before the documents are delivered up.—We remain, &c.

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*Letter taken by a Scotch Bank from a Merchant opening a Credit with a Bank abroad.*

I request that you will open a credit with the Bank of , Calcutta, in favour of Messrs. A B & Co., to the extent of £ , to be availed of by their drafts upon the Bank of Scotland at months after sight, and payable in London, such drafts being accompanied by bills of lading indorsed to the Bank of Scotland, for merchandise invoiced to an amount not less than the sum drawn for. And I engage to pay to the Bank of Scotland the amount of all drafts drawn against said credit, at their maturity, together with the charges and commission.

As collateral security for this obligation, I assign my interest in the bills of lading of said shipments, and I hand you herewith a policy of insurance upon the merchandise for £ . In the event of my failing to pay the drafts at maturity, I hereby authorise you to warehouse the merchandise at my expense, and to sell the same as you may deem most advisable, binding myself to make good any deficiency that may arise between the proceeds of the shipments and the amount of the drafts drawn in connection with the credit, with all charges thereon. The credit to remain in force until the day of . —I am, &c.,

(*Signed*) A B.

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## RECEIPT FOR A JUDICIAL CONSIGNMENT.

BANK OF SCOTLAND,
EDINBURGH, 1*st January*, 1876.

Received, for the Governor and Company of the Bank of Scotland, from James Webster, Writer in Glasgow, the sum of One hundred pounds sterling, said to be the fund *in medio* in the process of multiplepoinding depending before the Court of Session (*or* Sheriff-court of ), at the instance of Andrew Fergus' Executors against William Anderson and others; and which fund was, by interlocutor of the Lord Ordinary (*or*, of the Sheriff of the county), dated 26th December last, ordered to be consigned in bank, to abide the orders of the Court; and which sum and interest thereon shall be made furthcoming to the party or parties who may be preferred by the Court thereto.

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## RECEIPT FOR THE SURPLUS OF THE PRICE OF HERITAGES SOLD UNDER A BOND AND DISPOSITION IN SECURITY.

NATIONAL BANK OF SCOTLAND,
EDINBURGH, 1*st March*, 1876.

Received, for the National Bank of Scotland, from Thomas Craig, Grocer, George Street, Edinburgh, and William Morrison, residing in Leith, the sum of One hundred and twenty-six pounds ten shillings, being the surplus of the price of certain heritages described in and sold under a bond and disposition in security, granted by A B to C D, for Five hundred pounds, dated ; and which sum is, in terms of the Act 31 & 32 Vict. c. 101, consigned, in the names of the said Thomas Craig and William Morrison, as the seller and purchaser of said heritages, for behoof of the party or parties having best right thereto.

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## RECEIPT FOR THE REDEMPTION-MONEY OF A BOND AND DISPOSITION IN SECURITY.

COMMERCIAL BANK OF SCOTLAND,
EDINBURGH, 1*st May*, 1876.

Received, for the Commercial Bank of Scotland, from Andrew Fullarton, Merchant, residing in Great King Street, Edinburgh, the sum of Six hundred and thirty pounds sterling, being the whole sums, principal and interest, payable by him under a bond and disposition in security, dated , granted by the said Andrew Fullarton to Henry Mortimer, Accountant in Edinburgh, for the sum of Six hundred pounds; and which first-mentioned sum is consigned by the said Andrew Fullarton, in terms of the Act 31 & 32 Vict. c. 101.

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## RECEIPT FOR UNCLAIMED DIVIDENDS IN A SEQUESTRATION.

BANK OF SCOTLAND,
EDINBURGH, 1*st May*, 1876.

Received from A B, trustee on the estate of C D, the sum of £ , being the amount of dividends unclaimed in said sequestration, conform to list annexed, which is carried to the "Account of Unclaimed Dividends" in the books of the Bank, in terms of "The Bankruptcy (Scotland) Act, 1856," sec. 153.

(*Annex List of Unclaimed Dividends.*)

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## MANDATE TO OPERATE UPON A CURRENT-ACCOUNT.

To the Manager of the Bank
of (*Place and Date.*)

SIR,—I hereby request that you will honour all drafts or cheques signed by C D for me on my current (or cash) account, which shall be as valid as if signed by myself. This mandate to subsist till recalled in writing.—I am, &c.,

A B.

(*No Stamp for this.*)

## MANDATE TO INDORSE A DEPOSIT-RECEIPT.

To the Manager of, &c. (*Place and Date.*)

I authorise A B to uplift, indorse, and discharge a deposit-receipt in my favour, granted by the Bank of Scotland, for the Sum of One hundred pounds, dated .—I am, &c.

(*A 10s. stamp required for this.*)

## MANDATE TO ACCEPT TRANSFER OF BANK STOCK.

To the Manager of the Bank of (*Place and Date.*)

Sir,—I hereby authorise A B to accept for me a transfer, in my favour, of £ Bank Stock, in the Books of the Bank; and the acceptance of the said A B shall be as binding on me as if made by myself.—I am, &c.

(*A 10s. stamp required for this.*)

## MANDATE TO DRAW DIVIDENDS.

To the Manager, &c. (*Place and Date.*)

Please pay to A B all dividends due and to become due on the stock of the Bank of Scotland standing in my name, and his receipt shall be as effectual as if granted by myself.—I am, &c.

(*No stamp requisite.*)

## PROCURATION FOR SIGNING BILLS, &c.

We, A B and C D, Merchants in Glasgow, carrying on business under the firm of A B & Co., do hereby NOMINATE, CONSTITUTE, and APPOINT E, our principal clerk, to be our procurator, for the purpose and to the effect after-mentioned; GIVING, GRANTING, and COMMITTING unto him full power, warrant, and authority for us and in our name, as our procurator, to grant

and subscribe all bills, promissory-notes, or other obligations necessary to the carrying on of our business; as also to draw, accept, indorse, and discharge all bills, promissory-notes, accounts, and vouchers of debt of every kind due to or by us, and to subscribe by procuration all writings which may be necessary for that purpose, declaring that all such writings so subscribed by the said E shall be equally valid and binding on us as if the same were subscribed by ourselves, or by our firm: In witness whereof these presents, written by Henry Ramsay, our clerk, are subscribed by us and our said firm, at Glasgow, on the Twentieth day of April, Eighteen hundred and sixty-two, before these witnesses, the said Henry Ramsay, and Alexander Mackie, also our clerk.

(*Signed*) A B.
C D.
A B & Co.

Henry Ramsay, *witness.*
Alex. Mackie, *witness.*

(*A 10s. stamp required.*)

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## GUARANTEE FOR PAYMENT OF BILLS.

To the Treasurer of the Bank
of Scotland. (*Place and Date.*)

Sir,—We, A B & C D, Merchants in Glasgow, conjunctly and severally, guarantee you full and final payment of all bills discounted, or which may hereafter be discounted by you, to or binding upon Messrs. John Anderson & Sons, Merchants, Glasgow; but providing that our conjunct and several liability under this guarantee shall not exceed the sum of One thousand pounds, and interest thereon, at five per cent., from the date of demand; and providing, further, that this guarantee shall continue in full force and effect, notwithstanding any change or addition of partners in said firm, or dissolution thereof.—We are, Sir, your obed. servts.

(*A 6d. stamp sufficient.*)

## GUARANTEE BY A FIRM FOR PAYMENT OF BILLS.

To the Manager, &c. (*Place and Date.*)

Sir,—We, John Smith & Company, Manufacturers, Glasgow, and John Smith and George Green, sole partners thereof, guarantee you full and final payment of all bills discounted, or which may hereafter be discounted by you, to or binding upon William Thomson, Commission Agent, Glasgow (*if obligation is to be limited, insert the sum, as above*); and providing that this guarantee shall subsist notwithstanding any change in the partners of our firm.—We are, Sir, your obed. servts.

(*A 6d. stamp only.*)

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## GUARANTEE FOR PAYMENT OF OVERDRAFTS UPON A CURRENT-ACCOUNT.

To the Manager of, &c.

Sir,—I, George Wilson, Manufacturer, Kilmarnock, hereby guarantee you full and final payment of all sums advanced, or which may hereafter be advanced by you to Andrew Ferguson, Grocer in Edinburgh, on current-account in his name; but providing that my liability under this guarantee shall not exceed Two hundred pounds sterling, and interest thereon from the date of demand: In witness whereof these presents, written by Henry Ramsay, clerk in the Bank of Scotland's Office, Edinburgh, are subscribed by me, at Edinburgh, on the first day of May, Eighteen hundred and seventy-six, before these witnesses, John Thomson and Andrew Haig, both clerks in the Bank of Scotland.

(*Signed*) Geo. Wilson.

John Thomson, *witness.*
And. Haig, *witness.*

(*A 6d. stamp only.*)

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## GUARANTEE FOR OVERDRAFTS ON A CASH-ACCOUNT.

To the Bank of

We, John Smith, Manufacturer, Glasgow, and John Henderson, Merchant there, conjunctly and severally, guarantee you full and final payment of all sums overdrawn, or which may hereafter be overdrawn by Alexander Simpson & Co., Commission Agents in Edinburgh, on cash-account kept in their name at your office in Edinburgh; Declaring, that our conjunct and several liability under this guarantee shall not exceed the sum of Three hundred pounds, and interest thereof at five per cent. per annum from the date of demand; and that this guarantee shall continue in full force and effect, notwithstanding any changes in said firm, or dissolution thereof: IN WITNESS WHEREOF these presents, written by John Barclay, clerk in the Bank of Scotland, Edinburgh, are subscribed by me, the said John Smith, at Edinburgh, on the Fourth day of March, Eighteen hundred and seventy-six, before these witnesses, Alexander MacLean and James Henderson, both clerks in the Bank of Scotland; and by me, the said John Henderson, at Edinburgh, on the Fifth day of same month and year, before these witnesses, the said John Barclay and David Haig, also clerk in the Bank of Scotland.

(*Signed*) JOHN SMITH.

Alex. MacLean, *witness.*
Jas. Henderson, *witness.*

JOHN HENDERSON.

John Barclay, *witness.*
David Haig, *witness.*

(*A 6d. stamp only.*)

## DELIVERY-ORDER FROM THE OWNERS OF COTTON.

Messrs. A B & Co.,
Cotton Brokers, Glasgow.

GLASGOW, 1*st May*, 1876.

GENTLEMEN,—Please deliver to the Bank, or their order, One hundred bales of Cotton, *ex* "Amelia," marked as under.—Your obed. servt.

(*Signed*) JAS. JOHNSTON.

H, 17.
H, 33.
H, 25.
H, 25.

100

(*To be stamped with One Penny stamp duty.*)

*Brokers to Bank.*

GLASGOW, 2*nd May*, 1876.

Referring to the Delivery-order, of which the prefixed is a copy, we have now to state that we hold the One hundred bales Cotton, therein referred to, on your account, free from all right of lien, excepting to the extent of what may be due to us for advances, for freight, and for warehouse rent.—We are, &c.

To the Manager of the

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## CLAIM FOR VOTING AND RANKING ON THE SEQUESTRATED ESTATE OF A COMPANY.

STATE OF DEBT due to the Bank of Scotland by Cumming & Fairley, Clothers in Edinburgh, as a Company, and John Cumming and Alexander Fairley, the individual partners of that firm, as at the date of their Sequestration on 28th February, 1876.

| | | | |
|---|---|---|---|
| I. On Cash-account kept at the office of the said bank in Edinburgh, in name of the said Cumming & Fairley, under Bond of Credit granted by them as a Company, and by the said John Cumming and Alexander Fairley, as Partners thereof and as individuals, and by William Simpson, Draper in Leith, and George Thomson, Brewer in Edinburgh, p. £600, dated 3rd January, 1874, . . | | £595 | 0 0 |
| Add Interest to 28th February, 1876, . . | | 7 | 10 0 |
| | | £602 | 10 0 |
| II. Principal sum overdrawn on said Cash-account per separate copy thereof, annexed hereto, and relative cheques, | £160 0 0 | | |
| Interest to 28th February, 1876, | 4 10 0 | | |
| | | 164 | 10 0 |
| [NOTE.—*The copy should start from the time the overdraft commenced, or with a docqueted balance.*] | | | |
| III. On Bill drawn by said Cumming & Fairley on, and accepted by, Robert Balfour, Draper, Falkirk, and indorsed to the said bank, by said Cumming & Fairley, dated 4th December, 1875, at three months' date, | £25 0 0 | | |
| Rebate of Interest, from 7th March, to date of Sequestration, | 0 2 6 | | |
| | | 24 | 17 6 |
| IV. On Bill drawn by said Cumming & Fairley on, and accepted by, James Smith, Draper, Dalkeith, and indorsed by the drawers to said Bank, dated 11th October, 1875, at 4 m/d., . . . . | £50 0 0 | | |
| Add Interest to date of Sequestration, . . . . | 0 10 6 | | |
| | | 50 | 10 6 |
| Carried forward, | | £842 | 8 0 |

| | | | |
|---|---|---|---|
| Brought forward, | | £842 | 8 0 |
| V. On Bill drawn by Peter Matthew, Manufacturer, Galashiels, on, and accepted by, the said Cumming & Fairley, and indorsed by the drawers to said bank, dated 1st November, 1875, at six months, p. £100, | £100 0 0 | | |
| Rebate of Interest from 4th May, 1876, to date of Sequestration, | 2 10 0 | | |
| | | 97 | 10 0 |
| VI. On the following Bills, binding on Thomson & Wallace, Drapers in Edinburgh, payment of which was guaranteed to the said bank by the said Cumming and Fairley, conform to their Letter of Guarantee to said bank, dated 1st May, 1875, viz. :— | | | |
| 1. Bill drawn by said Thomson & Wallace on George Miller, Clothier, Leith, dated 16th November, 1875, at 3 m/d., | £25 0 0 | | |
| Interest thereon, . . . . | 0 3 6 | | |
| | | 25 | 3 6 |
| 2. Bill drawn by John Thomson, Manufacturer, Dundee, on, and accepted by, said Thomson & Wallace, indorsed by the drawer to said bank, dated 15th October, at 3 m/d., . . . . | £30 0 0 | | |
| Interest thereon, . . . | 0 10 6 | | |
| | | 30 | 10 6 |
| | | £995 | 12 0 |

(*Date.*) —This is the State of Debt referred to in my affidavit annexed hereto.

(*Signed*) C D, Cashier.

A B, Justice of Peace for the County of Edinburgh.

## APPENDIX.

NOTE OF SECURITIES held by the said Bank against the said Debt.

| | | | |
|---|---|---|---|
| I. Securities over the Company Estate of the said Cumming & Fairley. | | | |
| 1. Bill drawn by the said Cumming & Fairley on, and accepted by, Thomas Davidson, Leith, dated 2nd January, 1876, at 3 m/d., p. £40, which is hereby valued at, . . . | £20 | 0 | 0 |
| 2. Bill drawn by said Cumming & Fairley on, and accepted by, Wm. Stevenson, Dunse, dated 1st February, 1876, at 2 m/d., p. £20, which is hereby valued at, . . . . . | 15 | 0 | 0 |
| | £35 | 0 | 0 |
| II. Security over the Individual Estate of the said John Cumming. | | | |
| Policy on the Life of the said John Cumming with the Scottish Widows' Fund, dated 1st March, 1850, p. £500, assigned to the said bank by assignation in their favour, by the said John Cumming, dated 11th May, 1870, which is hereby valued at, . . | £120 | 0 | 0 |
| III. Valuation of the obligations of parties liable in relief to the said Cumming & Fairley. | | | |
| 1. Robert Balfour, acceptor of Bill forming item No. III. in said State, . . . . . | £5 | 0 | 0 |
| 2. James Smith, acceptor of Bill forming item No. IV. in said State, . . . . . | 10 | 0 | 0 |
| 3. Thomson & Wallace, drawers of Bill No. 1, under item No. VI., . . . . . | 5 | 0 | 0 |
| 4. George Miller, acceptor last mentioned Bill, . | 5 | 0 | 0 |

| | |
|---|---|
| 5. John Thomson, drawer of Bill No. 2, under item No. VI. of said State, . . . | £7 10 0 |
| 6. Thomson & Wallace, acceptors of last-mentioned Bill, . . . . . | 10 0 0 |
| | £42 10 0 |

(*Date.*) —This is the Appendix referred to in my affidavit, annexed hereto.

(*Signed*) C D, Cashier.
A B, Justice of Peace for the County of Edinburgh.

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## AFFIDAVIT.

At Edinburgh, the Fourth day of March, Eighteen hundred and seventy-six years.

In presence of A B, one of Her Majesty's Justices of the Peace for the County of Edinburgh.

Compeared C D, Cashier, and in name and for behoof of the Bank of Scotland, who, being solemnly sworn and interrogated, depones, that Cumming & Fairley, Clothiers in Edinburgh, as a Company, and John Cumming and Alexander Fairley, the individual partners of that firm, were, at the date of their Sequestration on 28th February last, and still are, justly indebted and resting owing to the said bank the sum of £995, 12s., being the amount of the prefixed State of Debt, and conform to the several grounds of debt therein specified; which State is signed by the Deponent as relative hereto, and held as engrossed herein. Depones, That no part of said debt has been paid or compensated to the said bank (*if payments have been got from co-obligants since the Sequestration, state them here*), and that they hold no persons bound for the same other than the bankrupts and the other persons mentioned in said State. Depones, That, in security of the said debt, the said bank hold

the various securities specified in the Appendix to said State, which Appendix is here referred to and held as engrossed herein, and that they hold no other security for the said debt. Further, and with a view to voting on the company estate of the said Cumming & Fairley, the deponent hereby values the several and respective bills specified in the Note of Securities, forming the first head of said Appendix, at the respective sums there stated, amounting together to the sum of £35, and he values the obligations of the parties liable in relief to the said Cumming & Fairley, and bound on the several and respective Bills specified and contained in the said Appendix under the third head thereof, at the several and respective sums there mentioned, amounting *in cumulo* to £42, 10s., which two last-mentioned sums, amounting together to the sum of £77, 10s., being deducted from the foresaid sum of £995, 12s., leaves a balance of £918, 2s., for which the deponent claims a right to vote on the company estate of the said Cumming & Fairley: And, with a view to voting on the individual estate of the said John Cumming, the deponent hereby values the security held by the said bank over his estate, as specified in the said Appendix, under the second head thereof, at the sum of £120, and the deponent values the claim of the said bank against the estate of the said company at the sum of £250; and the claim of the said bank against the estate of the said Alexander Fairley, the other individual partner of said company, at the sum of £20, amounting, said three last-mentioned sums, to £390, which, being deducted from the foresaid sum of £995, 12s., leaves a balance of £605, 12s., for which the deponent claims a right to vote in all matters relating to the individual estate of the said John Cumming; and in like manner, the deponent, in claiming to vote on the individual estate of the said Alexander Fairley, hereby values the claim of the said bank against the said company at the sum of £250, and the claim of the said bank against the estate of the said John Cumming at the sum of £50, which two sums, amounting together to £300, being deducted from the foresaid sum of £995, 12s., leaves a balance of £695, 12s., for

which the deponent claims a right to vote in all matters relating to the individual estate of the said Alexander Fairley: Further, the deponent claims to be ranked on the said company estate, with a view to drawing a dividend for the foresaid sum of £995, 12s., under deduction of the foresaid sum of £35, the value of the foresaid securities over their estate, which sum being so deducted, leaves a balance of £960, 12s.; And he claims to be ranked on the estate of the said John Cumming with a view to drawing a dividend for the foresaid sum of £995, 12s., under deduction of the foresaid sum of £120, the value of the foresaid security over his estates, which, being so deducted, leaves a balance of £875, 12s.; and he claims to be ranked on the estate of the said Alexander Fairley for the foresaid sum of £995, 12s. All which is truth, as the deponent shall answer to God.

(*Signed*) C D, Cashier.
A B, Justice of the Peace for the County of Edinburgh.

NOTE.—*It is seldom of much practical importance to vote on the estates of individual partners of a company, so that in most cases the part of the Affidavit which refers to a vote on the individual estates might be omitted.*

*It will be kept in view that in a* Ranking Claim *on the estate of Partners, it is not necessary to value the Claim against the Company in the Affidavit. The trustee does this himself in adjusting the ranking.*

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AFFIDAVIT WHERE NO SECURITY IS HELD, AND WHERE THE BANKRUPT IS THE PROPER DEBTOR.

(*Prefix State.*)

At Edinburgh, the Fourth day of March, Eighteen hundred and seventy-six years.

In presence of A B, one of Her Majesty's Justices of the Peace for the County of Edinburgh.

Compeared C D, Cashier, and in name and for behoof of the Governor and Company of the Bank of Scotland, who, being

solemnly sworn and interrogated, depones, That Alexander Mackenzie, Brewer in Edinburgh, was, at the date of his sequestration on 27th March last, and still is, justly indebted and resting owing to the said bank the sum of One thousand and fifty pounds sterling, being the amount of the prefixed State of Debt, and conform to the grounds of debt therein enumerated, which State is signed by the deponent as relative hereto, and is held as engrossed herein. Depones, That no part of said debt has been paid or compensated to the said bank, and that they hold no persons bound for the same except the bankrupt and the other persons mentioned in said State, and no security for the same. All which is truth, as the deponent shall answer to God.

(*Signed*) C D, Cashier.

A B, Justice of the Peace for the
County of the City of Edinburgh.

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## MANDATE TO VOTE IN A SEQUESTRATION.

BANK OF SCOTLAND, 1*st May*, 1876.

SIR,—I hereby authorise you to attend, act, and vote at all Meetings in the Sequestration of the above named Alexander Mackenzie, with all the powers which belong to the Bank of Scotland.—I am, Sir, your obed. servt.,

C D, Cashier.

To James Mitchell, Esq.,
Accountant, Edinburgh.
[*or*]
Alexander Anderson, Esq.,
S.S.C., Edinburgh.

*No stamp is required.* See the Bankruptcy (Scotland) Act, 1856, sec. 184.

## FORM OF MORTGAGE OF STOCKS.

Loan of £

Memorandum of Agreement between
(hereinafter called the Borrower), on the one part, and the
(hereinafter referred to as the Lenders), on the other part.

Whereas, the Borrower having borrowed, or being desirous to borrow from the said BANKING COMPANY the sum of Sterling, for the term of calendar months from the day of , Eighteen hundred and seventy , has transferred, or does hereby undertake and agree to transfer, into the name of the said BANKING COMPANY the following Stocks or Shares, viz. :—

which are to be held by the said BANKING COMPANY as Security for the said Loan, upon the following Terms, that is to say :—

1. Interest is to be charged upon the Loan and upon all further Monies (if any) to be lent or paid by them to or for the Borrower, at the rate of per cent. per annum.

2. The Borrower shall, at the expiry of the said term of calender months, repay the said principal sum and interest.

3. Any Dividends which may be declared upon the said Stock or Shares are to be received by the Lenders, and placed to the Borrower's Credit, or to be paid by the Lenders to the Borrower or his Broker or Agent.

4. All Calls which may be made during the continuance of the Loan upon the Stock or Shares thus deposited, or upon any new Shares to which, if created, the holders of the existing Stock or Shares will be entitled, are to be paid by the Borrower; but should the Lenders pay them, then a Commission of Five Shillings per cent. to be charged thereon, in addition to interest on the same, after the above rate.

5. If at any time or times, during the continuance of this Agreement, the Market Value of the said Stock or Shares, or any of them, shall not be per cent. above the Money owing on this Security—said value to be ascertained by reference to the Price Lists of the London, Liverpool, Manchester, and Glasgow Stock Exchanges, or any one of them—the Borrower engages, within three days, upon being required by notice in writing to do so, by letter sent through the Post Office to the Borrower, addressed as above designed, to furnish such additional security, to the satisfaction of the Lenders, or at the Lenders' option, to repay so much of the Principal Money owing as shall always maintain the market value of the said securities at per cent. above the money owing.

6. At the termination of the period for which the Loan is contracted, the said BANKING COMPANY shall transfer to the Borrower, or order, upon being repaid the sum that shall then be due, together with all Calls made and paid by them or remaining unpaid, including any balance of Interest and Commission which may remain, after deducting the Dividends on the said Stock or Shares received in the interim, and provided the various stipulations contained in this Agreement have been fulfilled by the Borrower, the whole of the said Stock or Shares which shall then be in their hands; and failing the performance upon the Borrower's part of any of the requirements contained in this Agreement, the said BANKING COMPANY are hereby authorised and empowered, without further notice or authority, to sell and dispose of, at the market price of the day, the Stock or Shares then in their possession, or such part of them as they may see fit, and claim from the Borrower any deficiency that may thence arise.

7. Should the said BANKING COMPANY fail to deliver the Stock or Shares on the Borrower tendering the amount due at the termination of the period for which the Loan is contracted, the Borrower shall have power, after giving three days' notice to the Lenders, to purchase, at the market price of the day, a

similar amount of Stock or number of Shares, and a right to claim from the said BANKING COMPANY any difference that might arise in the purchase beyond the amount due to the said BANKING COMPANY.

8. A written notice sent to or by the Broker or Agent of either of the parties, shall be considered equally binding as if sent to or by the Principals, and all acts and things hereinbefore agreed, or authorised, to be done by, or to, or in favour of, the Borrower and Lenders respectively, shall or may respectively be done by, or to, or in favour of, their Executors, Administrators, or Assignees.

9. If the Broker or Agent of the Borrower shall require the Lenders to deliver or assign all or any portion of the said securities, either before or at the termination of the period for which this Loan is contracted, it shall be lawful for the Lenders (if they shall think fit) to do so, and to do and execute all such acts and deeds as may be necessary for the purpose.

In witness whereof, these presents, written by A B, clerk to the said , are subscribed by the said , and by the said , at Edinburgh, the Twentieth day of February, Eighteen hundred and eighty, before these witnesses, the said A B and C D, clerk to .

MEMORANDUM AS TO BANKING IN SCOTLAND (by Mr. JAMES SIMPSON FLEMING). Reprinted from the Appendix to the Report of the Select Committee of the House of Commons, on Banks of Issue, 1875.

REVISED, 1891.

The existing Scottish banks are ten in number, and are all joint-stock companies. They are:—

1. The Bank of Scotland.
2. The Royal Bank of Scotland.
3. The British Linen Company.
4. The Commercial Bank of Scotland Limited.
5. The National Bank of Scotland Limited.
6. The Union Bank of Scotland Limited.
7. The Town and County Bank Limited.
8. The North of Scotland Bank Limited.
9. The Clydesdale Bank Limited.
10. The Caledonian Banking Company Limited.

The six banks first mentioned have their head office or principal place of issue in Edinburgh, Nos. 7 and 8 at Aberdeen, No. 9 at Glasgow, and No. 10 at Inverness.

Banking in Scotland has no legal history prior to 1695.

*Bank of Scotland,*

By the Act of the Scottish Parliament, Will. III., Parl. 1, Sess. 5 (17th July, 1695), entitled "Act of Parliament for "erecting a Bank in Scotland," which recites that "our "Sovereign Lord, considering how useful a publick bank may "be in this kingdom, according to the custom of other kingdoms "and states, and that the same can only be best set forth and "managed by persons in company with a joint stock sufficiently "indued with these powers and authorities, and liberties "necessary and usual in such cases;" "a joynt-stock amount-"ing to the sum of twelve hundred thousand pounds money" (equal to £100,000 sterling) was allowed "to be raised by the "company hereby established for the carrying and management

" of a publick bank." The subscribers to the joynt stock were " declared to be one body corporat and politick by the name of " the Governor and Company of the Bank of Scotland." Provision was made for the management of the affairs of the bank by a governor, deputy-governor, and 24 directors. It was enacted "That the joynt-stock of the said bank continuing in " money shall be free from all publick burden to be imposed " upon money for the space of 21 years after the date hereof, " and that during this space it shall not be leisom to any other " persons to enter into and set up a distinct company of bank, " within this kingdom, besides those persons allenarly in whose " favors this Act is granted."

No special authority was conferred by the Act to issue bank notes, but such authority may be implied from the declaration, " That summar execution by horning shall proceed upon bills " or *tickets*" (the ancient Scottish name for bank notes) " drawn " upon or granted by or to and in favours of this bank, and the " managers and administrators thereof for the time."

The capital of the bank was increased to £200,000 sterling by the Act 14 Geo. III. c. 32; to £300,000 by the Act 24 Geo. III. c. 12; to £600,000 by the Act 32 Geo. III. c. 25; to £1,000,000 by the Act 34 Geo. III. c. 19; and to £1,500,000 sterling by the Act 44 Geo. III. c. 23.

The capital authorised by the last-mentioned Act has all been subscribed, and to the extent of £1,000,000 has been paid up.

By the Act 36 & 37 Vict. c. 99, the bank was authorised to create and issue additional capital stock to any amount, not exceeding £3,000,000 sterling. This extended power has been exercised by the creation and issue of £375,000 of additional capital stock, whereof two-thirds have been called up, making the capital created £1,875,000, with £1,250,000 paid up.

### *Royal Bank of Scotland.*

The Royal Bank of Scotland was incorporated by Royal Charter, dated the 31st May, 1727, with " full power and liberty " to exercise the rights and powers of banking in that part of

"the United Kingdom called Scotland only." The capital was not defined. The corporation was to consist of proprietors of the Equivalent Company (which was a Company incorporated by letters-patent granted in pursuance of the Act of Parliament 5 Geo. I. c. 20, entitled "An Act for setting certain yearly "funds payable out of the revenues of Scotland and other uses "mentioned in the Treaty of Union, and to discharge the "equivalents claimed on behalf of Scotland in terms of the same "treaty, and for obviating all future disputes, charges, and "expenses concerning these equivalents"), who were empowered to subscribe such part or share of their stock of the Equivalent Company as they should think proper, for and towards raising a fund for the more effectually carrying on the trade and business of banking. The company was authorised to "keep the money "or cash of any person or persons, bodies politic and corporate "whatsoever, and may borrow, owe, or take up, in Scotland, *on "their bills or notes payable on demand*, to be signed in such "manner and by such persons as the court of directors herein-"after mentioned shall direct and appoint, or in such other "manner as the said court of directors shall think fit, any sum "or sums of money whatsoever."

A second Royal Charter was granted to the bank, dated 1st November, 1738, which recited that certain of the proprietors of the Equivalent Company had subscribed parts and shares of their stock of that company into the Royal Bank to the extent of £111,000. The Charter authorised the increase of the capital to the extent of £40,000, making a total capital of £151,000, "and that either by taking subscriptions of other "equivalent stock not already subscribed into the said bank, or "by taking in subscriptions of certain sums of money upon "land security, or any other ways or means," that the directors should judge most safe and beneficial; and it was declared that in case the Parliament of Great Britain should redeem the equivalent stock, the Royal Bank of Scotland should continue for ever as if no such redemption were made.

By a third Charter, dated the 16th day of May, 1770, the

privileges, authorities, and rights formerly granted to the bank were confirmed, and the directors were empowered to assign and transfer the sum of £111,000 of equivalent stock originally subscribed into the bank, notwithstanding that the same was incorporated as the stock of the bank, and it was declared that, notwithstanding of such transfers or assignments of equivalent stock, the corporation of the Royal Bank should continue for ever, and the monies arising from such transfers or assignments should be deemed part of the stock of the bank.

The capital of the bank was increased to £300,000 by a fourth Charter, dated 10th June, 1783; to £600,000 by a fifth Charter, dated 5th June, 1788; to £1,000,000 by a sixth Charter, dated 7th August, 1793; to £1,500,000 by a seventh Charter, dated 31st January, 1804; and to £2,000,000 by an eighth Charter, dated 30th December, 1829.

By the Charter last mentioned, the power of the bank to sue and be sued, and its powers of investment were extended and enlarged, and the bank was required to render annually to the Lords Commissioners of the Treasury a certified account, showing the weekly amount of the bank's notes in circulation of each denomination.

By 36 & 37 Vict. c. 217, sec. 2, it was enacted that "it shall "be lawful for the Royal Bank to establish a branch for the "purpose of carrying on the business of banking in London, "and to take, hold, and dispose of lands and houses, and other "real property and estate for the purpose of such branch; pro- "vided that nothing in this Act contained shall authorise the "Royal Bank to issue its own bank notes elsewhere than in "Scotland." In exercise of this power a branch was established in London, in 1874.

The capital of £2,000,000, authorised by the Charter of 1829, is fully paid up.

### *British Linen Company.*

The British Linen Company was incorporated by a Royal Charter, dated 6th July, 1746, with "power to carry on the

"linen manufactory in all its branches, and for that purpose to "employ all necessary artificers, and to buy or sell flax, yarn, "and linen, and to do everything that may conduce to the "promoting and carrying on the said linen manufacture." The corporation was authorised to raise a capital joint stock not exceeding £100,000, and also "to take up money upon bills, "bonds, or obligations under their common seal at such rate of "interest from the borrowing thereof as they shall think fit, so "as the principal money which they shall so borrow do not "exceed at any time the sum of £100,000 sterling."

A second Charter was granted to the company, dated 5th June, 1806, which recites a petition of the company under their seal, setting forth, *inter alia*, "That the said corporation of the "British Linen Company had raised and completed the said "capital stock of £100,000 sterling, and did for some time "deal in the linen manufacture at Edinburgh, and other places "in Scotland: That in the first years after the institution of "the company, they found it necessary, in making their pay-"ments for linen, to issue promissory-notes, payable on demand, "and they soon found that they would be of more utility and "better promote the object of their institution, by enlarging "the issue of their notes to traders and manufacturers, than "by being traders or manufacturers themselves, and that they "had issued their notes in this way for nearly 60 years; that "the petitioners humbly conceived they could be of still more "utility to the country and the trade thereof, if they were per-"mitted to enlarge their capital by an addition of the sum of "£100,000 to the said original capital to carry on their "business." The Charter authorised the company to enlarge the capital to any sum not exceeding £200,000, "to be "employed in the same way and manner and to the same "purposes as the said original stock of £100,000 has been used "and employed under the said former letters patent, and to "accomplish the ends of the institution in manner before "mentioned."

By subsequent Charters, the last of which was dated 19th

March, 1849, power was given to augment the company's capital to any sum not exceeding £1,500,000 in all, "for the "purpose of carrying on the business of banking as heretofore "accustomed."

The capital of the British Linen Company already created and paid up is £1,000,000.

*Commercial Bank of Scotland Limited.*

The Commercial Bank of Scotland was established in 1810, and incorporated by a Royal Charter, dated 5th August, 1831, "for the purpose of carrying on the business of banking in all "its branches." The capital was declared to be £3,000,000 sterling, to be held and disposed of in the manner mentioned in the deed of partnership of the company, bearing date the 31st day of October, 1810, and several subsequent dates. It is declared by the Charter "that nothing contained in these "presents shall be construed as intended to limit the responsi- "bility and liability of the individual partners of the said cor- "poration, for the debts and engagements lawfully contracted "by the said corporation, which responsibility and liability is to "remain as valid and effectual as if these presents had not been "granted, any law or practice to the contrary notwithstanding."

The paid up capital of the Commercial Bank of Scotland amounts to £1,000,000.

*National Bank of Scotland Limited.*

This company was established on 21st March, 1825, in terms of a contract of copartnership between and among the partners, by which the capital stock of the company was fixed at £5,000,000. The Bank was incorporated by a Royal Charter, dated the 5th day of August, 1831, which contains a declaration as to the liability of the individual partners to the same effect as that in the charter of the Commercial Bank above quoted.

The capital now paid up amounts to £1,000,000.

The Commercial and National banks have now been registered under the Companies Acts as limited liability com-

panies, each with a capital of five millions, whereof one-fifth is paid up.

The remaining Scottish banks have all been constituted since the year 1825 as joint-stock companies, under contracts of co-partnership, and have all been registered and incorporated under the Companies Act, 1862, first as unlimited companies, and subsequently as limited liability companies. The Union Bank of Scotland as now constituted, although not formed under that name till a comparatively recent date, is the result of the union of several issuing banks, some of which were established in the eighteenth century. It has head offices both in Glasgow and in Edinburgh.

The paid-up capital of these banks is as follows :—

| | |
|---|---|
| Union Bank of Scotland Limited, . | £1,000,000 |
| Town and County Bank Limited, . | 252,000 |
| North of Scotland Bank Limited, . | 400,000 |
| Clydesdale Bank Limited, . . | 1,000,000 |
| Caledonian Banking Co. Limited, . | 150,000 |

The limit of liability being in each case fixed at five times the amount paid up.

The right to issue bank notes or notes payable to bearer on demand, has, from the infancy of Scottish banking been regarded as a common-law right, not only of the great banking corporations, but also of individuals, whose power of issue was, prior to 1844, limited only by their credit with the public, and their ability to maintain their notes in circulation. Accordingly, immediately after the institution of the Bank of Scotland in 1695, that bank began to issue such notes of the values of £100, £50, £20, £10, and £5. The reported case of *More* v. *Murray*, 25th November, 1696 (Brown's Supplement, vol. iv. p. 331), shows that such notes were then in active circulation. In 1704 the Bank of Scotland began to issue notes of the value of 20s. From its establishment in 1727 the Royal Bank issued

notes of various denominations. The case of *Crawford*, 24th February, 1749 (reported in Morison's Dictionary, p. 875), shows the view taken by the Court of Session of bank notes. In that case a promissory-note of the Bank of Scotland had been stolen, and having subsequently come into the possession of the Royal Bank for value, a competition arose between the Royal Bank and the original owner; and the Court held, "First, "that money is not subject to any *vitium reale*, and that it "cannot be vindicated from the *bona fide* possessor, however "clear the proof of the theft may be; second, that bank notes, "serving the purposes of money, must be entitled to the same "privileges."

In the early part of the eighteenth century the Bank of Scotland began to issue notes containing what was called an optional clause, declaring the note to be payable either on demand, or, in the option of the issuer, six months after demand, with interest at the rate of 5 per cent. from the date of demand for payment.* Other banking companies followed this example, and notes were issued of as low a denomination as 5s. The consequence was, that coin almost disappeared from Scotland. The optional clause was put an end to by 5 Geo. III. c. 49 (1765),† which prohibited the issue of any bank note "but such as shall "be payable on demand in lawful money of Great Britain, and "without reserving any power or option of delaying payment "thereof for any time or term whatsoever," and the issue of promissory-notes for less than 20s. was thereby prohibited.

The right of the Bank of Scotland, Royal Bank of Scotland, and British Linen Company "to issue promissory-notes for the "sums of one pound, one guinea, two pounds, and two guineas, "payable to the bearer on demand," was expressly recognised

* Lawson's "History of Banking," p. 114.

† Sec. 7, which contains this prohibition, was repealed by Statute Law Revision Act, 1867, as "virtually repealed or superseded;" see 54 Geo. III. c. 4, and 57 Geo. III. c. 46, as to tokens; 8 & 9 Vict. c. 38, secs. 5, 16, 18, 19.

by 55 Geo. III. c. 184, as it had previously been by 39 Geo. III. c. 107, 48 Geo. III. c. 149.

By 9 Geo. IV. c. 65, the issue of promissory-notes for less than £5 made or issued in Scotland or Ireland, was prohibited in any part of England under severe penalties.

With these exceptions, till the passing of the Act of 1844, there was no legislative interference with what was, till that year, the right at common law of any banking company, and of any individual or body of individuals in Scotland to make and issue promissory-notes, payable to bearer on demand. During the latter half of the eighteenth and the early part of the nineteenth century, this right was exercised by numerous joint-stock companies, as well as by private banking copartnerships in various parts of Scotland.

Prior to 1844 all private banks of issue had ceased to exist in Scotland, having been absorbed by one or other of the great joint-stock banks.

The Act of 1844 (sec. 10) enacts, "that from and after the "passing of this Act no person, other than a banker, who, on "the 6th day of May, 1844, was lawfully issuing his own bank "notes, shall make or issue bank notes in any part of the "United Kingdom."

This Act was followed by the 8 & 9 Vict. c. 38 (1845), "to "regulate the issue of bank notes in Scotland," under which, since its date, the circulation of the Scotch banks has been conducted. Appended hereto is a copy of the last published *Gazette* return of the circulation of the existing Scotch banks.

The Act 7 & 8 Vict. c. 113, was passed "to regulate joint-"stock banks in England," and it was extended to Scotland and Ireland by 9 & 10 Vict. c. 75. These Acts were amended by 17 & 18 Vict. c. 73, and by 19 Vict. c. 3, the period was extended, "for which Her Majesty may grant letters-patent of "incorporation to joint-stock banks in Scotland existing before "the Act of 1846." None of the existing Scotch banks availed themselves of the privileges conferred by these Acts.

Legal doubts as to the right of partnerships trading under

a descriptive name to sue under that name (*vide Culcreugh Cotton Company*, 27th November, 1822, 2 Shaw 47; *Cabbell* v. *Brock*, 13th May, 1828, 3 W. & S. 75; and *Commercial Bank* v. *Pollock's Trustees*, 28th July, 1828), led to the passing of the Act 7 Geo. IV. c. 67 (1826), "to regulate the mode in "which certain societies or copartnerships for banking in Scot- "land may sue and be sued." The younger banks being now incorporated by registration under the Companies Act, 1862, are entitled to sue in their corporate name.

Reference may be made to a "Return of the Names of all "Banks existing in Scotland on 1st January in the years 1819, "1830, 1845, and 1864 respectively," ordered by the House of Commons to be printed, 29th April, 1864, as showing the gradual decrease in the number of banks in Scotland which has resulted from numerous amalgamations. Since the date of that return the Central Bank of Scotland (No. 23) has been united with the Bank of Scotland, and the City of Glasgow Bank failed in 1878.

J. S. FLEMING.

[OVER.

*From the "Edinburgh Gazette."*

## Average Amount of Bank Notes in Circulation, and of Coin held Four Weeks ending 23rd May, 1891.

| | Head Office or Principal Place of Issue. | Circulation Authorised by Certificate. | Average Circulation during Four Weeks ending as above. | | | Average Amount of Coin held during Four Weeks ending as above. | | |
|---|---|---|---|---|---|---|---|---|
| | | | £5 and upwards. | Under £5. | Total. | Gold. | Silver. | Total. |
| | | £ | £ | £ | £ | £ | £ | £ |
| Bank of Scotland, . . . | Edinburgh, | 343,418 | 310,337 | 748,532 | 1,058,869 | 754,771 | 112,567 | 867,338 |
| Royal Bank of Scotland, . | Do. | 216,451 | 285,434 | 619,623 | 905,057 | 722,484 | 74,548 | 797,032 |
| British Linen Company, . | Do. | 438,024 | 227,824 | 586,225 | 814,049 | 440,244 | 76,837 | 517,081 |
| Commercial Bank of Scotland, | Do. | 374,880 | 246,722 | 656,362 | 903,084 | 567,717 | 63,323 | 631,040 |
| National Bank of Scotland, . | Do. | 297,024 | 214,256 | 545,053 | 759,309 | 493,281 | 90,898 | 584,179 |
| Union Bank of Scotland, . | Do. | 454,346 | 265,829 | 641,565 | 907,394 | 455,500 | 117,958 | 573,458 |
| Aberdeen Town and County Bank, . . . . | Aberdeen, | 70,136 | 113,774 | 144,562 | 258,336 | 204,802 | 22,842 | 227,644 |
| North of Scotland Banking Company, . . . | Do. | 154,319 | 185,740 | 211,500 | 397,240 | 253,645 | 29,164 | 282,809 |
| Clydesdale Banking Company, | Glasgow, | 274,321 | 216,843 | 474,835 | 691,678 | 425,562 | 85,882 | 511,444 |
| Caledonian Banking Company, | Inverness, | 53,434 | 45,592 | 67,932 | 113,524 | 63,965 | 15,994 | 79,959 |
| | | 2,676,350 | 2,112,351 | 4,696,189 | 6,808,540 | 4,381,971 | 690,013 | 5,071,984 |

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LORIMER AND GILLIES, PRINTERS, 31 ST. ANDREW SQUARE, EDINBURGH.